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LELAND·STANFORD·JVNIOR·VNIVERSITY

THE

CONSTITUTIONAL LAW

OF THE

UNITED STATES

BY

WESTEL WOODBURY WILLOUGHBY, PH. D.

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TABLE OF CONTENTS.

VOLUME I.

PAGE.

PREFACE iii
TABLE OF CONTENTS v
TABLE OF CASES xxxi
TEXT OF THE CONSTITUTION lxix

CHAPTER I.

THE SUPREMACY OF THE CONSTITUTION.

SECTION 1. The Courts and Unconstitutional Laws 2
2. Marbury v. Madison 2
3. Criticism 3
4. The expediency of this judicial power 7
5. The courts do not "nullify" laws 10

CHAPTER II.

PRINCIPLES OF CONSTITUTIONAL CONSTRUCTION.

SECTION 6. Circumstances under which the courts will hold an act of Congress void 12
7. Legislative motives 18
8. Expediency and reasonableness of legislation not subject to judicial determination 19
9. Presumption in favor of the constitutionality of an act of Congress 20
10. Presumption in favor of the constitutionality of a state statute 22
11. The force of contemporaneous or long continued legislative interpretation 25
12. Legislative and executive practice not absolutely binding. 26
13. Extrinsic evidence 27
14. Technical terms 28
15. The interpretative value of debates in constitutional conventions 30
16. *The Federalist* 31
17. History of the times 32
18. The interpretative value of legislative debates 33
19. Resort to the preamble for purpose of construction 35
20. "We, the People" 36
21. "Constitution" 37
22. "Common defense and general welfare" 39
23. The Constitution is to be construed as a whole 40
24. So-called "natural" or "unwritten constitutional" laws have no constructive force 41
25. The "spirit" of the Constitution 43

PAGE.

SECTION 26. Applicability of constitutional provisions to modern conditions 44
27. The Wilson-Roosevelt doctrine of construction..... 47
28. *Stare Decisis* 51

CHAPTER III.

THE DIVISION OF POWERS BETWEEN THE UNITED STATES AND ITS MEMBER STATES.

SECTION 29. Federal powers..... 53
30. Express and implied powers..... 54
31. Federal powers to be liberally construed..... 55
32. Strict construction a corollary of the States' Rights Doctrine 58
33. "Necessary and proper"..... 58
34. McCulloch v. Maryland... 59
35. Administrative necessity as a source of federal power.... 62
36. International sovereignty and responsibility as a source of implied powers 64
37. Resulting powers..... 65
38. Inherent sovereign powers..... 66
39. Express limitations upon the Federal Government..... 70
40. Implied limitations upon the Federal Government..... 72
41. Exclusive and concurrent federal powers..... 73

CHAPTER IV.

THE SUPREMACY OF FEDERAL AUTHORITY.

SECTION 42. Federal supremacy 78
43. The States may not be coerced..... 86
44. Conclusion 91

CHAPTER V.

THE MAINTENANCE OF FEDERAL SUPREMACY: THE FREEDOM OF FEDERAL AGENCIES FROM INTERFERENCE OR CONTROL BY THE STATES.

SECTION 45. State taxation of federal governmental agencies..... 92
46. Property of federal agencies may be taxed..... 95
47. State taxation of federal franchises..... 99
48. State taxation of patent rights..... 100
49. State taxation of federally licensed occupations..... 101
50. State taxation of federal salaries 102
51. State taxation of federal property..... 102
52. State taxation of federal securities..... 103
53. Income from federal securities exempt from state taxation. 107
54. State taxation of circulating notes of national banks..... 107
55. State taxation of bequests to the United States..... 108
56. State taxation of national banks 108
57. Federal taxation of state agencies..... 110

PAGE.

SECTION 58. Federal taxation of property of municipalities..... 114
59. South Carolina v. United States..... 114
60. Federal taxation of state documents..... 118
61. Federal exercise of eminent domain in the States..... 119

CHAPTER VI.

THE MAINTENANCE OF FEDERAL SUPREMACY: WRITS OF ERROR FROM THE FEDERAL SUPREME COURT TO STATE COURTS.

SECTION 62. Writs of error to state courts..... 120
63. Martin v. Hunter's Lessee..... 121
64. Cohens v. Virginia..... 121

CHAPTER VII.

THE MAINTENANCE OF FEDERAL SUPREMACY: REMOVAL OF SUITS FROM STATE TO FEDERAL COURTS.

SECTION 65. Right of removal of criminal cases..... 124
66 Tennessee v. Davis..... 125
67. Right of removal in civil cases..... 129

CHAPTER VIII.

THE MAINTENANCE OF FEDERAL SUPREMACY BY HABEAS CORPUS TO STATE AUTHORITIES.

SECTION 68. State courts may not interfere with federal authorities.. 130
69. Issuance of the writ by federal courts..... 131
70. The Neagle Case..... 135
71. Writ issued only when imperative..... 136

CHAPTER IX.

THE MAINTENANCE OF FEDERAL SUPREMACY: THE INDEPENDENCE OF FEDERAL COURTS FROM STATE INTERFERENCE.

SECTION 72. Independence of federal authorities..... 141
73. Injunctions from federal to state courts..... 142
74. State restrictions upon the right of removal of suits from state to federal courts..... 145

CHAPTER X.

THE FEDERAL CONTROL OF THE FORM OF STATE GOVERNMENTS.

SECTION 75. State autonomy 151
76. Republican form of government defined..... 151
77. The constitutionality of referendum laws..... 154
78. Dorr's rebellion 156
79. Luther v. Borden..... 158
80. The reconstruction of Southern States after the Civil War. 161
81. Restricted suffrage compatible with republican form of government 164

PAGE.

SECTION 82. Public office not a property or contract right 166
83. Suits between two or more claimants to state office..... 168
84. Taylor v. Beckham..... 171

CHAPTER XI.

FEDERAL SUPERVISION OF STATE ACTIVITIES: THE FOURTEENTH AMENDMENT.

SECTION 85. The Fourteenth Amendment..... 175
86. The Slaughter House Cases..... 177
87. Effect of Fourteenth Amendment upon rights enumerated in first eight amendments..... 183
88. Suffrage not a necessary incident of citizenship..... 185
89. Legislative power granted Congress by the Fourteenth Amendment 186
90. Summary 193

CHAPTER XII.

INTERSTATE RELATIONS: FULL FAITH AND CREDIT CLAUSE.

SECTION 91. States independent of one another..... 194
92. Congressional legislation 195
93. Federal judgments and decrees..... 197
94. Full faith and credit clause applies only to civil judgments and decrees..... 197
95. Full faith and credit clause establishes a rule of evidence.. 198
96. Judgments *in rem* and *in personam*..... 201
97. *Nul Tiel Record*..... 202
98. Marriage and Divorce..... 205

CHAPTER XIII.

INTERSTATE RELATIONS: THE COMITY CLAUSE.

SECTION 99. Privileges and immunities..... 213
100. Political privileges 215
101. State proprietary privileges..... 216
102. Privileges of one State not carried into other States..... 217
103. Corporations not citizens within the meaning of the Comity Clause 218

CHAPTER XIV.

INTERSTATE RELATIONS: EXTRADITION.

SECTION 104. Interstate extradition 222
105. Extradition by the States of the Union to foreign States. 224
106. Auxiliary legislation by the States..... 226
107. Judicial examination of extradition proceedings..... 226
108. Abduction and forcible return of fugitives from justice. 228
109. Trial for offenses other than those for which extradited.. 231
110. Who is a "fugitive"..... 232
111. Fugitive slaves 234

CHAPTER XV.

INTERSTATE RELATIONS: COMPACTS BETWEEN THE STATES AND BETWEEN THE UNITED STATES AND THE STATES.

PAGE.

SECTION 112. Compacts between the States 235
113. Compacts between the States and the United States..... 238
114. Equality of the States..... 239
115. Contracts *in re* proprietary interests..... 242
116. Suits between States..... 243

CHAPTER XVI.

THE PERSONS SUBJECT TO THE JURISDICTION OF THE UNITED STATES.

SECTION 117. Territorial sovereignty 244
118. *De facto* control 244
119. Status of aliens 245
120. Double allegiance 246
121. Status of aliens in the United States..... 248
122. Domiciled aliens 249
123. Aliens not domiciled..... 250
124. Exclusion and expulsion of aliens..... 251
125. The Chinese 251
126. Protection of the persons and property of aliens..... 254

CHAPTER XVII.

AMERICAN CITIZENSHIP.

SECTION 127. Citizenship defined 258
128. State and federal citizenship distinguished..... 260
129. The Dred Scott Case..... 262
130. The Fourteenth Amendment..... 270
131. District of Columbia and Territories..... 273
132. Boyd v. Nebraska criticized..... 273
132*a*. Wong Kim Ark Case..... 274

CHAPTER XVIII.

NATURALIZATION.

SECTION 133. Naturalization by statute 280
134. Naturalization by annexation of territory and by treaty.. 284

CHAPTER XIX.

EXPATRIATION.

SECTION 135. Denial of right of expatriation..... 286
136. Right recognized by United States..... 288

CHAPTER XX.

THE LEGAL STATUS OF INDIANS.

SECTION 137. Indian lands 292
138. The legal status of Indians..... 294

PAGE.

SECTION 139. Federal power over Indians..... 298
140. Congressional legislation..... 300
141. Federal jurisdiction exclusive: Cherokee Nation v. Georgia. 302
142. Worcester v. Georgia..... 304
143. Naturalization of Indians by statute..... 307
144. Disappearance of Indian tribal autonomy..... 308

CHAPTER XXI.

THE ADMISSION OF NEW STATES.

SECTION 145. The admission of new States..... 320

CHAPTER XXII.

THE POWER OF THE UNITED STATES TO ACQUIRE TERRITORY.

SECTION 146. The right to annex based on the right to admit new States. 325
147. Annexation of Louisiana: Views of Jefferson..... 328
148. Territories as embryo States..... 332
149. Judicial *Dicta*: Taney's views..... 334
150. Conclusions..... 337
151. The right to annex based on the treaty and war-making powers..... 339
152. Power of the United States to alienate territory..... 342

CHAPTER XXIII.

THE MODES IN WHICH AND THE PURPOSES FOR WHICH TERRITORY MAY BE ACQUIRED BY THE UNITED STATES.

SECTION 153. Constitutional modes of acquiring territory..... 344
154. Annexation by joint resolution..... 344
155. Consent of inhabitants of annexed territory not required. 347

CHAPTER XXIV.

THE CONSTITUTIONAL SOURCES OF POWER OF CONGRESS TO GOVERN THE TERRITORIES.

SECTION 156. Power to govern territories not questioned..... 351
157. Doctrines of the Dred Scott Case..... 353

CHAPTER XXV.

THE EXTENT OF THE POWER OF CONGRESS TO GOVERN THE TERRITORIES.

SECTION 158. Power to govern absolute..... 362
159. Classes of territorial governments..... 364
160. Constitutionality of these governments..... 365
161. Territorial governments are congressional governments... 369

CHAPTER XXVI.

THE DISTRICT OF COLUMBIA.

SECTION 162. The government of the District of Columbia..... 372
163. Places purchased..... 378

CHAPTER XXVII.

MILITARY AND PRESIDENTIAL GOVERNMENT OF ACQUIRED TERRITORY.

SECTION 164. Conquest or military occupation does not operate to annex territory ..... PAGE. 380
165. Authority of *de facto* governments 386
166. Status of conquered domestic territory 387
167. Presidential governments 388

CHAPTER XXVIII.

THE ANNEXATION OF TERRITORY BY TREATY.

SECTION 168. Congressional action not needed to complete annexation of territory acquired by treaty 392
169. Cross v. Harrison 393
170. De Lima v. Bidwell 396
171. Dooley v. United States 400
172. Duties of President prior to congressional action 403

CHAPTER XXIX.

THE DISTINCTION BETWEEN INCORPORATED AND UNINCORPORATED TERRITORIES.

SECTION 173. Limitations upon powers of Congress 405
174. Possible status of Territories after annexation 406
175. Unincorporated territory 406
176. Distinction between incorporated and unincorporatel territories 407

CHAPTER XXX.

THE INSULAR CASES.

SECTION 177. Downes v. Bidwell 411
178. Position of Justice Brown 421
179. Argument of dissenting justices 427
180. Summary and criticism of Downes v. Bidwell 429
181. Status of Hawaii: Hawaii v. Mankichi 432
182. Right to jury held not to be fundamental 436
183. Alaska incorporated: Rasmussen v. United States 438
184. Other Insular Cases 439

CHAPTER XXXI.

CITIZENSHIP IN THE TERRITORIES.

SECTION 185. Effect of cession of territory on citizenship of inhabitants. 443
186. Treaty provisions 444
187. Statutory provisions 447
188. Native inhabitants of Porto Rico not aliens: Gonzales v. Williams 448

CHAPTER XXXII.

FOREIGN RELATIONS: THE TREATY POWER.

PAGE.

SECTION 189. The federal power exclusive..... 450
190. The federal power all-comprehensive..... 451
191. The manner of exercise of the treaty-making power..... 455
192. The negotiation of treaties..... 456
193. Powers of the Senate..... 458
194. The "recognition" of foreign governments..... 461
195. The power of the Senate to amend treaties..... 462
196. Foreign States held to a knowledge of the location of treaty-making powers 464
197. Plenary powers of ratification..... 465

CHAPTER XXXIII.

INTERNATIONAL AGREEMENTS WHICH DO NOT REQUIRE THE APPROVAL OF THE SENATE.

SECTION 198. International agreements not requiring approval by Senate. 467
199. International powers of the President as Chief Executive: International correspondence 468
200. Protocols 469
201. *Modi Vivendi* 471
202. International agreements entered into by the President under his military powers..... 471
203. International agreements entered into, or action taken by the President, by virtue of authority granted him by congressional statute 472
204. International agreements entered into, or action taken, by the President by virtue of authority granted him by congressional statute 476
205. Extradition 479

CHAPTER XXXIV.

CONGRESSIONAL LEGISLATION FOR THE ENFORCEMENT OF TREATIES.

SECTION 206. Treaties cannot appropriate money..... 480
207. Congress may by statute abrogate treaties..... 484
208. Whether the treaty-making power may modify or repeal laws enacted by Congress..... 485
209. Treaties and revenue acts..... 488

CHAPTER XXXV.

CONSTITUTIONAL EXTENT OF THE TREATY-MAKING POWER.

SECTION 210. Treaty-making power granted without express limitations. 493
211. Implied limitations 493
212. The treaty-making power and the reserved rights of the States 495

PAGE.

SECTION 213. Judicial *dicta* that reserved rights of the States may not be infringed 497
214. Instances in which treaties have been upheld though infringing the reserved rights of the States 499
215. The true doctrine 502
216. Constitutional limits to the treaty-making power 503
217. Legislative powers ancillary to treaty-making powers 506
218. The treaty-making power may not "incorporate" foreign territory into the United States 507
219. The treaty-making power may alienate territory of the United States or of a State or of States 507
220. The violation of treaties 513
221. Treaties remain internationally binding upon the United States even when Congress has refused the legislation necessary to put them into full force and effect, or when it has abrogated them by subsequent legislation, or when the Supreme Court has declared them unconstitutional 515
222. The date at which treaties go into effect 517
223. The denunciation of treaties 518
224. The construction of treaties 518

CHAPTER XXXVI.

THE AMENDMENT OF THE FEDERAL CONSTITUTION.

SECTION 225. The amending clause 519
226. Presidential approval not required 520
227. Scope of the amending clause 521

CHAPTER XXXVII.

CONGRESS: ITS ORGANIZATION: PRIVILEGES OF MEMBERS.

SECTION 228. The name 524
229. Qualifications for senators and representatives 524
230. Qualifications determined by Congress 525
231. Disqualification of congressmen to hold federal offices 528
232. Ineligibility of congressmen to offices, the emoluments of which have been increased 529
233. Privileges of members of Congress 530

CHAPTER XXXVIII.

ELECTION OF MEMBERS OF CONGRESS.

SECTION 234. Members of the House of Representatives: their apportionment among States 533
235. The mode of apportionment 535
236. Congressional districts 536
237. Members of the House of Representatives: by whom elected 537

PAGE.

SECTION 238. The right to vote for representatives not a necessary incident of national citizenship 537
239. Though determined by state law the right to vote for representatives is a federal right 540
240. Federal control of congressional elections 543
241. Enforcement clause of the Fifteenth Amendment 550
242. Disfranchising clauses of the Southern States 551
243. The power of the United States to compel the election by the States of representatives to Congress, senators and presidential electors 555
244. Election of senators 557
245. Popular election of senators 559
246. Vacancies in the Senate 559
247. Vacancies in the House of Representatives 560

CHAPTER XXXIX.

THE PROCESS OF LEGISLATION AS CONSTITUTIONALLY DETERMINED.

SECTION 248. Constitutional provisions 561
249. Conclusiveness of the records of congressional proceedings. 562
250. Constitutional force of rules of the House and Senate .. 564
251. Revenue measures 566
252. Appropriation acts 567
253. Presidential participation in law making 567
254. Resolutions 568
255. Parts of bills may not be vetoed 568
256. Riders 569
257. May bills be signed by the President after the adjournment of Congress? 569
258. Signing of bills during recess of Congress 571

CHAPTER XL.

THE GENERAL POWERS OF CONGRESS.

SECTION 259. General powers 573

CHAPTER XLI.

FEDERAL POWERS OF TAXATION.

SECTION 260. Taxes defined 575
261. Taxation and eminent domain 576
262. The extent of the taxing power 577
263. The use of the taxing power, not for revenue but for regulation 578
264. Federal powers of taxation 582
265. Taxes, duties, imposts, and excises defined 582
266. Limitations upon the federal taxing power 582
267. Due process of law and taxation 583
268. Taxation must be for a public purpose 585

PAGE.

SECTION 269. Power of Congress to appropriate money..... 588
270. Equality in taxation 593
271. Uniformity in taxation..... 596
272. What constitutes uniformity throughout the United States 598
273. State inheritance taxes..... 599
274. Federal inheritance taxes..... 602
275. Protective tariffs 607
276. Bounties 607
277. Export duties 608
278. Direct taxes 613
279. Income tax cases: Pollock v. Farmers' L. & T. Co..... 616
280. The federal corporation tax of 1909..... 619
281. Federal inheritance taxes not direct..... 620
282. Federal taxation and due process of law: hearing required. 621
283. Hearing before administrative tribunal sufficient..... 622
284. Summary modes of collection..... 624
285. Notice 625
286. Borrowing power of the United States: legal tender.... 626

VOLUME II.

CHAPTER XLII.

INTERSTATE AND FOREIGN COMMERCE.

SECTION 287. The Commerce Clause: its importance..... 629
288. Purpose of the Commerce Clause..... 630
289. Commerce defined: transportation essential..... 631
290. The instrumentalities of commerce..... 631
291. Commerce embraces water navigation..... 632
292. The transportation of persons is commerce..... 633
293. Bills of exchange not articles of commerce..... 633
294. Insurance not commerce..... 634
295. Lotteries 638
296. Bearing of the lottery decision on insurance..... 639
297. Commerce does not include the production of the commodities transported 640
298. Intent to export not controlling..... 641
299. Interstate commerce includes the sale of the articles imported 642
300. The original package doctrine..... 643
301. Difficulties in applying original package doctrine..... 645
302. Summary: General definitions of commerce..... 650
303. Exclusiveness of federal control over interstate commerce. 650
304. Gibbons v. Ogden..... 651
305. New York v. Miln..... 655

PAGE.

SECTION 306. License Cases 656
307. Passenger Cases 658
308. Cooley v. Port Wardens..... 658
309. Subjects of local regulation by the States..... 660
310. The police powers of the States and commerce..... 661
311. Applications of the doctrine of the police powers of the State in their relation to interstate commerce..... 665
312. State regulation of interstate trains..... 665
313. State inspection laws 670
314. State quarantine laws 674
315. Federal quarantine laws. 676
316. State game laws..... 676
317. The States may absolutely exclude from their borders only such articles as are intrinsically not merchantable or not legitimate articles of commerce..... 678
318. Liquor legislation..... 680
319. The Wilson Act..... 681
320. Construction of the Wilson Act..... 683
321. Proposed legislation..... 693
322. Oleomargarine cases..... 694
323. The States and foreign corporations doing an interstate commerce business 695
324. Foreign corporations "doing business" within the States. 698
325. What constitutes "doing business" in the State..... 699
326. State taxation and interstate foreign commerce..... 699
327. License taxes 701
328. Taxation of foreign corporations..... 702
329. State tax law must not discriminate against products of other States, or against companies doing an interstate commerce business 703
330. Drummers 705
331. Peddlers 709
332. State taxation of articles of commerce..... 711
333. State taxation of goods in transit..... 712
334. State taxation of persons in transit..... 714
335. Taxation of property of interstate carriers..... 714
336. Assessment of property of interstate carriers for purposes of taxation..... 716
337. Vessels: Rolling Stock: unit of use rule..... 717
338. State taxation of receipts from interstate commerce.... 720
339. Taxation of net receipts..... 724
340. Charter provisions 724
341. Taxation of capital stock of interstate commerce companies 725
342. State regulation of carriers..... 726
343. State regulation of railway rates 728
344. Routes running outside of the State but with both terminals within the State..... 732

CHAPTER XLIII.

FEDERAL LEGISLATIVE POWER OVER INTERSTATE COMMERCE.

PAGE.

SECTION 345. Federal legislation 734
346. Federal police regulations 735
347. Prohibition of interstate commerce 736
348. Federal regulation of child labor 738
349. The Federal Employers' Liability Law of 1906 741
350. Employers' Liability Law of 1908 743
351. Federal Safety Appliances Acts 744
352. Federal Eight Hour Law 745
353. Trade unions and interstate commerce; federal legislation with reference to 746
354. Regulation of interstate railroad rates 748
355. The right of Congress to delegate its rate-making power to a commission 749
356. The federal anti-trust act 750
357. *In re* Greene 751
358. United States v. E. C. Knight Co 752
359. United States v. Trans-Missouri Freight Association 753
360. United States v. Joint Traffic Association 753
361. Hopkins v. United States 754
362. Anderson v. United States 755
362*a*. Addyston Pipe & Steel Co. v. United States 755
363. Montague v. Lowry 756
364. Northern Securities Case 756
365. Beef Trust Case 758
366. Danbury Hatters Case 759
367. Other cases 761
368. The Commodities Clause of the Hepburn Act of 1906 762
369. Federal control of corporations under the Commerce Clause 763
370. Power of the Federal Government to charter companies to do a manufacturing business within the States 764
371. Federal permission to state manufacturing companies to engage in interstate commerce 766
372. Federal taxing power and interstate commerce 767
373. Federal control of navigable waters 768
374. Federal control of foreign commerce 769
375. Commerce with the Territories and with the District of Columbia 773
376. Commerce with the Indians 773

CHAPTER XLIV.

OTHER POWERS OF CONGRESS.

Naturalization.

SECTION 377. Naturalization 774

Bankruptcy.

PAGE.

SECTION 378. Bankruptcy: Definition of 774
379. Federal power not exclusive 775
380. State bankruptcy laws and the obligation of contracts .. 776
381. State laws have no extraterritorial force 776
382. Uniformity 777
383. Due of process of law 779
384. State laws suspended but not annulled by Federal Bankruptcy Law. Effect of the law of 1898 779

Coinage and Standards of Weights and Measures.

385. Coinage 780
386. Weights and measures 781

Counterfeiting.

387. Counterfeiting 781
388. The passing and the uttering of counterfeit coin distinct offenses 781

Postal Service.

389. Federal power 782
390. Constitutional views of Munroe 783
391. Federal power to provide postal agencies 784
392. Exclusion from the mails: freedom of press: searches and seizures: *Ex parte* Jackson 784
393. *Ex parte* Rapier 788
394. Power of the States to exclude from their borders objectionable mail matter 790
395. States may not maintain postal agencies 790
396. Fraud orders 791
397. Protection of the mails: *In re* Debs 791

Patents and Copyrights.

398. Patents 792
399. Copyrights: trade-marks 793

Piracies and Felonies on the High Seas and Offenses against the Law of Nations.

400. Piracies, etc. 794

War.

401. Declaration of war 795
402. Civil war 796
403. Letters of marque and reprisal and captures on land and water 798
404. Other military powers 798

CHAPTER XLV.

PROHIBITIONS ON CONGRESS.

PAGE.

SECTION 405. Absolute and qualified prohibitions 799
406. Importation of slaves 800
407. Suspension of *habeas corpus* 801
408. Bills of attainder 801
409. *Ex post facto* legislation 803
410. Appropriations 805
411. Limitations with respect to the definition and punishment of crime 806
412. Jury trial 806
413. Jury trial in the District of Columbia and the Territories 807
414. Unanimity 807
415. Twelve jurors required 808
416. Courts and actions in which jury is not required 808
417. Petty offenses 810
418. Infamous crimes 811
419. Waiver of constitutional guaranties 813
420. Right to jury trial not fundamental 815
421. Speedy trial 815
422. Public trial 816
423. Double jeopardy 816
424. What constitutes jeopardy 818
425. Jeopardy and the right of appeal 820
426. The constitutionality of appeal by the government in criminal cases 822
427. Self-incrimination: immunity from, not a requirement of due process of law 823
428. Self-incrimination: what constitutes 825
429. Right may be waived 825
430. When right may be claimed 826
431. To compel testimony statutory immunity must be complete 826
432. Corporations not protected against testimony by their agents 827
433. Private books and papers 828
434. Unreasonable searches and seizures 828
435. Corporations protected 829
436. Boyd v. United States 829
437. Cruel and unusual punishments 830
438. Treason 833
439. May be committed by aliens 834
440. Domicile not necessary 834
441. No distinction in United States between high and petit treason 835
442. Misprision of treason 835
443. What constitutes treason 835
444. Enlistment of men does not amount to levying war 836

PAGE.

SECTION 445. Treason against a State of the Union..... 839
446. Offenses, other than treason, against the existence and operations of the Federal Government..... 839
447. Jury trial in civil suits..... 840
448. Waiver of jury in civil cases..... 841
449. Religious freedom 841
450. Freedom of speech and press..... 842
451. Seditious libel 845
452. The right peaceably to assemble and petition..... 845
453. The right to bear arms..... 846
454. The quartering of troops..... 848
455. Slavery and involuntary servitude..... 848
456. Enforcement clause of the Thirteenth Amendment..... 848
457. Involuntary servitude: peonage..... 850
458. Seamen 853
459. Contracts for personal services: enforcement of..... 854

CHAPTER XLVI.

DUE PROCESS OF LAW.

SECTION 460. Due process of law: definition of..... 856
461. Historical inquiry not conclusive..... 858
462. Rules of evidence and procedure may be changed..... 860
463. Appeal not essential to due process..... 862
464. Confronting witnesses 863
465. Trials in courts of law not essential..... 863
466. Unessential statutory formalities..... 864
467. Fixed interpretation of laws not guaranteed..... 864
468. Due process and substantive rights..... 865
469. *Per legem terrae*..... 865
470. Distinction between English and American constitutional doctrines 865
471. Doctrine adopted that due process includes substantive rights 868
472. Erroneous interpretation of the law..... 868
473. Life 872
474. Liberty 872
475. Equal protection of the law..... 873
476. The Federal Government and the obligation of contracts. 874

CHAPTER XLVII.

PROHIBITIONS LAID UPON THE STATES.

SECTION 477. Prohibitions upon the States..... 877
478. Bills of credit..... 878
479. *Ex post facto* legislation..... 881
480. Equal protection of the law..... 881
481. Corporations protected 882

PAGE.

SECTION 482. Illustrative cases arising under the Equal Protection Clause 884
483. Equal protection of the law does not control the grant of political rights 886
484. Classifications 886
485. Classifications must be reasonable..... 887
486. State laws and judicial systems not required to be uniform throughout the State..... 888
487. Equal protection: requires similar but not the same privileges 889

CHAPTER XLVIII.

THE OBLIGATION OF CONTRACTS.

SECTION 488. The Obligation of Contracts Clause..... 891
489. Changes in means or manner of enforcement of contracts. 892
490. Contracts may be validated by curing technical defects. 892
491. Contracts by the State not to tax..... 892
492. Contracts to which a State is a party..... 893
493. What constitutes a contract..... 893
494. Foreign corporations: permission to do business within the State 894
495. Charters of public corporations..... 895
496. Contracts by municipal corporations..... 896
497. Charters of private corporations are contracts: The Dartmouth College Case..... 897
498. Charter grants strictly construed..... 898
499. Charles River Bridge Co. v. Warren Bridge Co..... 899
500. Other cases 900
501. Regulation of charges of public service corporations.... 901
502. The police power and the obligation of contracts..... 902
503. Tax exemptions 905
504. Impairment of contracts by taxation..... 907
505. Instances of incapacity of the States to contract..... 908
506. Regulation of rates..... 909
507. Eminent domain and the obligation of contracts..... 910
508. The construction of contracts..... 911
509. Existence of a contract a federal question..... 912
510. Constitutionality of state laws alleged to impair contracts a federal question..... 913
511. Decisions of state courts: how far controlling in federal courts 914
512. Doctrine in cases reaching the Supreme Court by writs of error to state courts..... 916
513. McCullough v. Virginia..... 917
514. Muhlker v. N. Y. & H. Ry. Co..... 918
515. Refusal of federal courts to follow state decisions holding state laws void..... 920

PAGE.

SECTION 516. Distinction between cases coming to the Supreme Court by writs of error to state courts, and those originating in lower federal courts 921
517. Cases based on diversity of citizenship 921
518. Gelpcke v. Dubuque 922
519. Extension of the doctrine of Gelpcke v. Dubuque 925
520. Great Southern Fireproof Hotel Co. v. Jones 925

CHAPTER XLIX.

CONSTITUTIONAL LIMITATIONS UPON THE TAXING POWERS OF THE STATES.

SECTION 521. Constitutional provisions 927
522. Special assessments 928
523. Taxes and special assessments distinguished 929
524. Constitutional requirements of special assessments 930
525. Resort to special assessments discretionary with the legislature 931
526. Special assessments in excess of benefits 933
527. Doctrine of Norwood v. Baker 933
528. Norwood v. Baker explained and limited by later cases. 936
529. Summary 943
530. Property taxed must be within the jurisdiction of the State 943
531. Personal liability of property-owners 944
532. Incorporeal hereditaments. Franchises, etc. 945
533. Taxation of tangible personal property 946
534. Taxation of property situated in several jurisdictions 949
535. The unit rule 950
536. Adams Express Co. v. Ohio 951
537. Taxation of capital stock companies operating in two or more States 954
538. Taxation of movables 954
539. Taxation of intangible personal property 955
540. Doctrine of state tax on Foreign Held Bonds Case 955
541. Taxation of shares of stock 957
542. Taxation of mortgages 960
543. The taxation of credits 961
544. Taxation of franchises 966
545. Taxation of good will 969
546. Tax exemptions and the impairment of contracts 968
547. Double taxation 968

CHAPTER L.

THE FEDERAL JUDICIARY. ITS ORGANIZATION.

SECTION 548. Constitutional provisions 970
549. Inferior federal courts 971
550. The Supreme Court: its organization 971

PAGE.

SECTION 551. Circuit courts of appeal: organization..... 972
552. Circuit courts: organization 972
553. District courts: organization..... 972
554. Court of claims: organization..... 973
555. Judiciary of the District of Columbia..... 973
556. The Supreme Court: original jurisdiction..... 973
557. Inferior courts may be granted jurisdiction of cases within the original jurisdiction of the Supreme Court..... 974
558. The Supreme Court: appellate jurisdiction..... 975
559. Appeals from circuit and district courts..... 976
560. Appeals from circuit courts of appeal..... 977
561. Appeals from territorial and other courts..... 978
562. Writs of error to state courts..... 978
563. Circuit courts of appeal: jurisdiction..... 980
564. Circuit courts: jurisdiction 980
565. District courts: jurisdiction..... 981
566. Court of claims: jurisdiction..... 982
567. Jurisdiction of federal courts based on diversity of citizenship 984
568. Citizenship of corporations..... 984
569. National banks 986
570. Federally chartered corporations..... 986
571. Fictitious citizenship 987
572. Federal jurisdiction of cases arising under the Constitution, treaties, and acts of Congress..... 987
573. Removal of suits from state to federal courts..... 989
574. Concurrent state judicial powers..... 990
575. Statutory provision for removal from state to federal courts 994
576. Congress may not confer jurisdiction upon state courts.. 997

CHAPTER LI.

POLITICAL QUESTIONS.

SECTION 577. Political questions 999
578. Cherokee Nation v. Georgia..... 1000
579. Georgia v. Stanton..... 1001
580. Existence and territorial extent of sovereignty..... 1003
581. War: belligerency: neutrality..... 1005
582. Treaties 1007
583. Diplomatic agents 1007
584. Other political questions..... 1008
585. Suits between the States..... 1009
586. Courts will assume jurisdiction when private rights involved 1009
587. Courts will not perform non-judicial functions..... 1011

CHAPTER LII.

THE LAW ADMINISTERED BY THE FEDERAL COURTS.

PAGE.

SECTION 588. Federal courts and international law..... 1013
589. Federal criminal law 1019
590. Federal courts and the construction of state law..... 1020
591. Force of state interpretations..... 1022
592. Rule not one of constitutional necessity: exceptions.... 1024
593. Equity 1024
594. Rules of evidence..... 1026
595. Unsettled construction of state law..... 1028
596. Obligation of contracts and the construction of state law. 1030
597. Federal courts and the common law..... 1030
598. Interstate commerce and the common law..... 1032
599. General principles of the common law as distinguished from their special and local applications..... 1033
600. General commercial law: Swift v. Tyson..... 1034

CHAPTER LIII.

SUITS BETWEEN STATES AND TO WHICH A STATE OR THE UNITED STATES IS A PARTY PLAINTIFF.

SECTION 601. Constitutional provisions 1040
602. Boundary disputes 1041
603. Maladministration of laws of a State to injury of citizens of another State not justiciable in a suit between the States 1044
604. State as *parens patriæ:* Missouri v. Illinois..... 1046
605. Irrigation rights: Kansas v. Colorado..... 1048
606. Justiciable quasi-sovereign rights of the States..... 1053
607. New Hampshire v. Louisiana and South Dakota v. North Carolina 1054
608. Suits of States against individuals..... 1054
609. Suits between the United States and a State of the Union. 1057
610. Suits between a State and foreign States or their citizens. 1059

CHAPTER LIV.

THE SUABILITY OF STATES.

SECTION 611. A sovereign State may not be sued without its consent.. 1061
612. Chisholm v. Georgia 1063
613. The Eleventh Amendment..... 1064
614. South Dakota v. North Carolina..... 1066
615. The Eleventh Amendment does not apply to suits instituted by a State: Cohens v. Virginia..... 1070
616. Corporations chartered by, and of which the State is a stockholder, may be sued..... 1073

PAGE.

SECTION 617. Effect of Eleventh Amendment upon federal constitutional rights guaranteed against state violation 1073
618. Suits against state officers: when considered suits against the State 1074
619. United States v. Peters 1075
620. United States v. Bank of the United States 1076
621. Rule as to States being parties of record 1078
622. Mandamus to state officials 1079
623. The Virginia debt controversy 1084
624. *In re* Ayres 1089
625. Reagan v. Trust Co 1091
626. Fitts v. McGhee 1092
627. *In re* Young 1093
628. Suits to recover specific pieces of property held by the State 1096
629. Set-offs against the State 1096
630. Liens 1097
631. The Arlington Case: United States v. Lee 1098
632. The doctrine of United States v. Lee applied to a State .. 1100
633. Suit maintainable only where the action against the officer is a possessory one 1101
634. Recent cases 1102
635. Suability of minor political bodies 1104
636. Statutory consent of the United States and of the States to be sued 1105

CHAPTER LV.

ADMIRALTY AND MARITIME JURISDICTION.

SECTION 637. Admiralty and maritime jurisdiction defined 1107
638. Extent of admiralty jurisdiction 1108
639. Admiralty jurisdiction extends to navigable waters wholly within a State 1110
640. Extent of federal admiralty jurisdiction 1111
641. Canals 1112
642. Repairs on land and in dry dock 1112
643. Admiralty jurisdiction does not carry with it general jurisdiction over navigable waters 1113
644. Admiralty courts 1113
645. State legislative powers with reference to admiralty matters 1114
646. Legislative powers of Congress flowing from admiralty and maritime jurisdiction 1117
647. The determination of the sphere of admiralty jurisdiction a judicial question 1118

CHAPTER LVI.

IMPEACHMENT.

PAGE.

SECTION 648. Constitutional provisions 1121
649. Persons subject to impeachment..... 1121
650. Who are civil officers..... 1122
651. When may a civil officer be impeached..... 1122
652. For what offenses impeachment will lie..... 1123
653. Punishment 1124
654. Effect of dissolution of Congress..... 1124

CHAPTER LVII.

THE ELECTION OF THE PRESIDENT AND VICE PRESIDENT.

SECTION 655. The executive department..... 1125
656. Apportionment of presidential electors: plenary powers of the States 1125
657. Vacancies 1127
658. Original provisions of Constitution as to election of President and Vice President: Inadequacy of..... 1128
659. Twelfth Amendment 1129
660. Counting the votes 1130
661. Law of 1887 1131
662. Constitutionality of 1132
663. Criticism of the act of 1887..... 1135

CHAPTER LVIII.

PRESIDENTIAL SUCCESSION.

SECTION 664. Constitutional provisions 1141
665. Act of 1792 1141
666. Act of 1886 1144
667. Questions undetermined by..... 1145
668. Third term 1147

CHAPTER LIX.

THE POWERS AND DUTIES OF THE PRESIDENT.

SECTION 669. The oath of office..... 1150
670. Constitutional powers of the President as Chief Executive. 1150
671. The Neagle Case 1152
672. The President as administrative chief..... 1156
673. Original intent that the President should be primarily a political chief: congressional control of administration 1156
674. Development of the administrative powers of the President. 1158
675. President acts through the heads of departments..... 1159
676. Except where his personal judgment is demanded..... 1160
677. Administrative appeals 1161

PAGE.

SECTION 678. Administrative decentralization in the States..... 1163
679. Increasing integration of federal administration..... 1163
680. Administrative interpretations 1164
681. Administrative regulations 1164
682. Power of the President to control the institution and prosecution of suits by the Department of Justice.... 1166
683. Information to Congress 1167
684. The President's control of foreign relations..... 1170
685. The veto power of the President..... 1170
686. The President's pardoning power..... 1170
687. The pardoning power may not be limited by Congress.. 1171
688. Acts of amnesty and remission of penalties..... 1172
689. Suspension of sentences..... 1173

CHAPTER LX.

THE APPOINTMENT AND REMOVAL OF OFFICERS.

SECTION 690. Constitutional provisions 1174
691. "Officer" of the United States defined..... 1174
692. Inferior officers 1175
693. Nominations 1176
694. Creation of offices 1178
695. Appointing powers of Congress..... 1178
696. Appointing powers may be vested only as provided by the Constitution 1180
697. Civil service requirements 1180
698. The power of removal..... 1181
699. Congress may regulate the removal of inferior officers.. 1185
700. Injunctions to prevent removal..... 1185
701. Mandamus to reinstate in office..... 1186
702. The powers of removal by state governors..... 1187

CHAPTER LXI.

MILITARY LAW.

SECTION 703. Military powers of the general government..... 1190
704. Military law: with reference to members of the army and navy 1191
705. Articles of war 1192
706. Obligation assumed by enlistment..... 1193
707. Powers of the military commander..... 1196
708. Courts martial 1197
709. Powers of courts martial: jurisdiction of civil courts to review proceedings of 1198
710. Jurisdiction of courts martial over offenses which are also violations of the local civil law..... 1200

PAGE.

SECTION 711. The power of Congress to vest in military tribunals exclusive jurisdiction over all offenses committed by military persons, including offenses which are also crimes against the civil law 1203
712. Powers of military tribunals in times of war 1206
713. Powers of the Commander in Chief of the army and navy .. 1207
714. Declaration of war 1208
715. The prosecution of war 1212
716. The organization and disciplining of the militia 1213
717. The militia as an arm of the Federal Government 1214
718. The use of the militia and federal troops to suppress domestic disorder 1215
719. Military government 1217
720. Military government and foreign territory 1217
721. Military government of hostile domestic territory 1219
722. Military government of domestic territory in times of peace 1221

CHAPTER LXII.

MARTIAL LAW.

SECTION 723. Martial law defined 1228
724. Martial law a form of the police power 1229
725. Police power defined 1231
726. Police power limited 1232
727. Martial law does not abrogate civil law and civil guarantees 1234
728. Martial law and military government distinguished 1236
729. Luther v. Borden 1236
730. Martial rule and war distinguished 1238
731. Powers of military commander in cases of domestic disorder 1240
732. Martial law in time of war 1241
733. Exercise of military authority outside the immediate theatre of war: *Ex parte* Milligan 1244
734. Criticism 1251
735. Mitchell v. Clark considered 1252
736. Habeas corpus 1253
737. Suspension of the writ 1254
738. Power of the President to suspend the writ 1255

CHAPTER LXIII.

THE SEPARATION OF POWERS.

SECTION 739. The separation of powers 1259
740. Separation of powers in the State not compelled by the federal Constitution 1260

PAGE.
SECTION 741. Powers separated in the Federal Government..... 1261
742. Separation not complete..... 1262
743. The general principle stated..... 1263
744. Distinction between legislative and judicial acts..... 1264
745. Declaratory and retroactive legislation..... 1265
746. Legislative control of judicial procedure and powers.... 1267
747. Jurisdiction and judicial power distinguished..... 1268
748. Powers of courts to punish contempts..... 1270
749. Pardoning power of the President and contempts..... 1270
750. Power of Congress to punish for contempts..... 1272
751. The performance of administrative acts by the courts.. 1274
752. Judicial review of administraeive determinations..... 1276
753. Judicial powers of administrative agents..... 1277

CHAPTER LXIV.

CONCLUSIVENESS OF ADMINISTRATIVE DETERMINATIONS.

SECTION 754. Due process of law does not demand determination of rights in courts of law..... 1278
755. Fraud orders 1283
756. Chinese Exclusion Cases 1286
757. The Ju Toy Case..... 1289
758. Constitutional requirements of administrative determinations 1291
759. Arbitrary administrative discretion..... 1293
760. Mandamus 1296
761. Ministerial acts: Marbury v. Madison..... 1297
762. Mandamus may not be used in place of an appeal..... 1298
763. Amenability of the President to compulsory judicial process 1300
764. Mississippi v. Johnson 1301
765. Georgia v. Stanton 1304
766. Head of executive department acting for the President: when amenable to writ..... 1304
767. Obligation of the President to enforce laws believed by him to be unconstitutional..... 1306
768. Liability of the State for acts of its officers..... 1309
769. Legal liability of public officials to private individuals injured by their acts: *ultra vires* acts 1310
770. Mandamus to compel performance of commands by administrative superior 1311
771. Responsibility of officers for improper exercise of authority: malice, etc. 1312
772. Responsibility of judges of courts of superior and general jurisdiction 1315

CHAPTER LXV.

THE DELEGATION OF LEGISLATIVE POWER.

PAGE.

SECTION 773. Delegated power may not be delegated..... 1317
774. Local governing powers may not be delegated..... 1317
775. Power to issue administrative ordinances may be delegated. 1318
776. Field v. Clark 1319
777. Other illustrative cases 1321
778. Delegation of rate-making powers..... 1323
779. The referendum as a delegation of legislative power..... 1324
780. Administrative ordinances 1325
781. Penal ordinances 1327

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UNITED STATES CONSTITUTIONAL LAW.

Volume II.

CHAPTER XLII.

INTERSTATE AND FOREIGN COMMERCE.

§ 287. The Commerce Clause: Its Importance.

In this chapter will be considered the respective powers of the Federal Government and of the States with reference to Interstate Commerce. The constitutional law governing this subject is very similar to, and its exposition will serve, in a very large measure, to explain, the law governing commerce with foreign nations, with the Indian tribes, with or between the Territories, and with the District of Columbia. In so far as there are differences these will be stated in the special paragraphs devoted to these classes of commerce.[1]

By Clause 3 of Section 8 of Article I of the Constitution, known as the Commerce Clause, Congress is given the power to "regulate commerce with foreign nations and among the several States, and with the Indian Tribes."

The full importance of the grant of authority contained in this clause did not appear for many years after the adoption of the Constitution. Not until 1824 by the decision of the Supreme Court in Gibbons v. Ogden[2] was a clear indication given of the extent of the power granted, and not until the Constitution was nearly a hundred years old did Congress begin the exercise of the

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[1] See §§ 374–376.

[2] 9 Wh. 1; 6 L. ed. 23.

authority granted it to regulate, affirmatively, commerce between the States. In Prentice and Egan's able treatise[3] it is observed that "before the year 1840 the construction of this clause had been involved in but five cases submitted to the Supreme Court of the United States. In 1860 the number of cases in that court involving its construction had increased to twenty; in 1870 the number was thirty; by 1880 the number had increased to seventy-seven; in 1890 it was one hundred and fifty-eight; while at present [1898] it is not less than two hundred and thirteen. In the state courts and United States Circuit and District courts the progress is not less significant. In 1840 this clause of the Constitution had been involved in those courts in fifty-eight cases only. In 1860 the number had increased to one hundred and sixty-four; in 1870 it was two hundred and thirty-eight; in 1880 it was four hundred and ninety-four; in 1890 it was eight hundred, while at the present time [1898] it is nearly fourteen hundred." These figures fully justify the remark that "such a history as this can, it is believed, find its parallel in no other branch of constitutional law."

§ 288. Purpose of the Commerce Clause.

There can be but little question that the chief and possibly the entire purpose of the Commerce Clause was, with reference to interstate commerce, to empower the federal authorities to prevent the States from interfering with the freedom of commercial intercourse between themselves; but, as the court observe in Addyston Pipe & Steel Co. v. United States,[4] "The reasons which may have caused the framers of the Constitution to repose power to regulate interstate commerce in Congress do not affect or limit the extent of the power itself." That is to say, the power being granted without qualification, except as to preference of the ports

[3] *The Commerce Clause of the Federal Constitution* (1898), p. 14.

[4] 175 U. S. 211; 20 Sup. Ct. Rep. 96; 44 L. ed. 136.

of one State over those of another, extrinsic evidence may not be resorted to in order to give to the grant a meaning narrower than that which its words convey.

§ 289. Commerce Defined: Transportation Essential.

Commerce has frequently been defined by the courts as intercourse. But not all intercourse is commerce. To render intercourse commerce there must be present the element of transportation, whether of persons or things. "Transportation is essential to commerce, or rather is commerce itself." [5]

The commodities transported may be tangible and ponderable, or intangible and imponderable, as, for example, telegraphic or telephonic messages.[6]

§ 290. The Instrumentalities of Commerce.

"The powers . . . granted by [the commerce clause] are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as the new agencies are successively brought into use to meet the demands of increasing population and wealth." [7]

The doctrine thus laid down in the Pensacola case has never

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[5] Railway Co. v. Husen, 95 U. S. 465; 24 L. ed. 527.

[6] Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1; 24 L. ed. 708; W. U. Tel. Co. v. Texas, 105 U. S. 460; 26 L. ed. 1067; Leloup v. Mobile. 127 U. S. 640; 8 Sup. Ct. Rep. 1383; 32 L. ed. 31; W. U. Tel. Co. v. Mass., 125 U. S. 530; 8 Sup. Ct. Rep. 961; 31 L. ed. 790.

The communications passing between a Correspondence School and its pupils are interstate commerce. International Text Book Co. v. Pigg, 217 U. S. 91; 30 Sup. Ct. Rep. 481.

[7] Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1; 24 L. ed. 708.

been questioned. Telephonic messages are, of course, covered by it. No case involving the transmission of wireless messages has arisen, but without doubt they would be treated as commerce, and the same would be true of messages and persons carried by balloons and other apparatus for the navigation of the air.

§ 291. Commerce Embraces Water Navigation.

Commerce includes navigation of the water, and, where this navigation is for the transportation of persons or goods to or from foreign countries or among the States, it is brought within the authority given to the Federal Government by the commerce clause.[8] This was established once for all in Gibbons v. Ogden.[9]

In that famous case, Marshall says: "The subject to be regulated is commerce. . . . The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or of barter. . . . The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to

[8] The authority of the Federal Government derived from the grant to it of admiralty and maritime jurisdiction is broader than this, extending as it does to all the public navigable waters whether wholly within or between the States. See Chapter LV.

[9] 9 Wh. 1; 6 L. ed. 23.

regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'" [10]

§ 292. The Transportation of Persons is Commerce.

That the transportation of persons is commerce was at first denied by Justice Barbour in the opinion which he rendered in New York v. Miln,[11] but this doctrine was at once overruled, and has not since been questioned. "Commerce among the States," the court say in the Lottery Case,[12] "embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph."

§ 293. Bills of Exchange not Articles of Commerce.

In Nathan v. Louisiana[13] the court lay down the doctrine that the buying and selling of foreign bills of exchange, while to be sure an aid to, and an instrument of, commerce, is not itself commerce. "The individual," say the court, "who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit . . . is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the ship builder, without whose labor foreign commerce could not be carried on." And also: "A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail." [14]

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[10] At the time the Constitution was adopted almost all the commerce then being carried on among the States was by water, and there is considerable ground for believing that those who framed and adopted the commerce clause had exclusively in mind commerce by water. As to this see Prentice, *Federal Power over Carriers and Corporations* (1907).

[11] 11 Pet. 102; 9 L. ed. 648.

[12] Champion v. Ames, 188 U. S. 321; 23 Sup. Ct. Rep. 321; 47 L. ed. 492.

[13] 8 How. 73; 12 L. ed. 992.

[14] Commenting on this case, Prentice and Egan say: "It seems, in view of the remarkable development of the banking system within the past fifty years, and its importance in relation to commerce, that the regulation of

§ 294. Insurance not Commerce.

The writing, selling, and transmission of insurance policies has been held not to be commerce.

That the business of fire insurance is not interstate commerce was decided in Paul v. Virginia.[15]

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interstate and foreign bills of exchange might in time fall within the federal commercial power. Where such bills represent payment for articles brought from other States, they may perhaps be considered to bear the same relation to the purchase, sale and exchange of commodities that freights and fares bear to their transportation. From another standpoint, bills of exchange may be said, in their relation to transportation of money, to bear some analogy to the relation which a system of free interchange of cars would bear to railroad traffic conducted in the absence of such a system. It is true, both of bills of exchange and of such a system of interchange of cars, that their relation to interstate transportation is in that they make such transportation to some extent unnecessary; and yet a State may not forbid this free interchange of cars, because to do so would place a new burden upon commerce among the States. To say that an interstate bill of exchange is merely evidence of the transfer of title to personal property located in another State is not only to ignore the fact that money, as the circulating medium, is essential to all commerce, but when sustained the argument seems to prove too much. If the bill of exchange be merely evidence of indebtedness in another State, it may be taxed at the discretion of the State within which it is drawn (Kirtland v. Hotchkiss, 100 U. S. 491; 25 L. ed. 558); and it might, therefore, be prohibited by the State; for 'questions of power do not depend on the degree to which it may be exercised' (Brown v. Maryland, 12 Wh. 419; 6 L. ed. 678). If this could be done, the statement that no burden could be placed upon interstate commerce by a State would be subject to substantial modification. It seems possible that the rule which would be applied in such a case would be stated in Erie Railway Co. v. State (31 N. J. L. 531), where it was held that 'whenever the taxation of a commodity would amount to a regulation of commerce, within the prohibition of the Constitution, so will the taxation of an inseparable incident or necessary concomitant of such commerce.' In People v. Raymond (34 Cal. 492), an act providing for the raising of revenue from a tax upon foreign and inland bills, and passengers, was held not to be in the nature of a police regulation, but an attempt at the regulation of commerce, and therefore void. On the other hand, in *Ex parte* Martin (7 Nev. 140) a statute requiring the fixing of revenue stamps to foreign bills of exchange was held to be a legitimate exercise by the State of its power of taxation." *Commerce Clause of the Constitution*, p. 48.

[15] 8 Wall. 168; 19 L. ed. 357. See also Liverpool & L. L. & Fire Ins. Co. v. Mass., 10 Wall. 566; 19 L. ed. 1029; Philadelphia Fire Assn. v. New York, 119 U. S. 110; 7 Sup. Ct. Rep. 108; 30 L. ed. 342.

That the business of marine insurance is not interstate commerce was held in Hooper v. California.[16]

In New York Life Ins. Co. v. Craven[17] these cases are cited with approval and applied to life insurance, the court saying: "We repeat, the business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the perils of the sea. And we add, or against the uncertainty of man's mortality."

In Paul v. Virginia a state law which forbade any insurance company not incorporated by the State, from doing business in the State without a license, was held valid as not a regulation of, or restraint upon, interstate commerce. To the argument that insurance is intercourse for the purpose of exchanging sums of money for promises of indemnity against losses, Justice Field, who rendered the majority opinion of the court, said: "The defect of the argument lies in the character of the business. Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce, in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signatures and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect — are not executed contracts — until delivered by the agent in Virginia.

[16] 155 U. S. 648; 15 Sup. Ct. Rep. 207; 39 L. ed. 297.

[17] 178 U. S. 389; 20 Sup. Ct. Rep. 962; 44 L. ed. 1116.

They are, then, local transactions and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of good in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

In Hooper v. California the court emphasizes the distinction between interstate commerce or an instrumentality thereof, and the mere incidents of which insurance is one which may attend the carrying on of such commerce. "This distinction," the court declares, "has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with the trade between the States; and would exclude state control over many contracts purely domestic in their nature."

These decisions of the court in Paul v. Virginia and Hooper v. California, which have since served as the basis of decisions with reference to other forms of insurance, have, since their rendition, been severely criticized. And, especially during recent years, when, with the enormous growth of insurance companies doing a business national in character, the need for federal regulation has seemed urgent to many, arguments have been put forth to show why the doctrine of the Supreme Court should be overruled, and companies doing an insurance business in more than one State be held to be engaged in interstate commerce.

The act of 1903 which created the Department of Commerce and Labor provides that the Department shall have the power "to gather, compile, publish and supply useful information concerning corporations doing business within the limits of the United States as shall engage in interstate commerce or in commerce between the United States and any foreign country, including

corporations engaged in insurance." In Congress an effort was made to have a separate bureau of insurance provided for, and this project was abandoned only in the conference committee to which the bill went. In his annual message of December, 1904, President Roosevelt declared: "The business of insurance vitally affects the great mass of the people of the United States, and is national, and not local, in its application. It involves a multitude of transactions among the people of the different States and between American companies and foreign governments. I urge that Congress carefully consider whether the power of the Bureau of Corporations cannot constitutionally be extended to cover interstate transactions in insurance."

That the force of the cases already decided may be weakened, it has been argued that in each of them the validity of a state law was involved and not the constitutionality of a federal statute. Should an act of Congress, regulative of insurance, be passed and questioned in the courts, it is argued that a presumption in favor of its validity would exist which does not exist as to the invalidity of state laws claimed to be in violation of the commerce clause.

Furthermore, it is argued that the reasoning of the court in these decided cases has been defective in so far as it is based on the fact that a contract of insurance is not, in itself, an article of commerce. This of course is true, except in so far as it is treated as a piece of paper; but though not an article of commerce it is, it is argued, an instrument of commerce. Thus, for example, it is said, "Every contract of insurance is an agreement to pay, for which there is a sufficient consideration. Such being the substance of the contract, the final object of insurance, or of the insurance business, is an exchange of property. This fact stands out most clearly, perhaps, in life insurance, where A delivers annually to B a certain amount of property, and B, in return, at a given date, or upon the happening of a given event delivers to

A or his appointee, a certain amount of property. The property usually consists of money."[18]

§ 295. Lotteries.

By act of March 2, 1893, entitled "An act for the suppression of lottery traffic through national and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States,"[19] the carriage of lottery tickets from one State to another, whether by mail, or by freight or express was absolutely prohibited. Two objections to the constitutionality of this measure were raised. First, that the regulative power given to the Federal Government over interstate commerce did not include the power absolutely to prohibit that commerce. This objection will be considered in a later chapter. Secondly, it was objected that lottery tickets are not articles of commerce,— the chief reliance for this contention being the decisions of the court as to bills of exchange and contracts of insurance.

After having been three times argued before the Supreme Court the Lottery Law was upheld in Champion v. Ames,[20] four justices dissenting. The majority, in their opinion, holding lottery tickets to be articles of commerce, say: "It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Asuncion, Paraguay. Money was placed on deposit

[18] *American Law Register*, December, 1900.

[19] 28 Stat. at L. 963.

[20] 188 U. S. 321; 23 Sup. Ct. Rep. 321; 47 L. ed. 492.

at different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign company represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895. (28 Stat. at L. 963, U. S. Comp. Stat. 1901, p. 3179.) That fact is not without significance in view of what the court has said. That act, counsel for the accused well remarks, 'was intended to supplement the provisions of prior acts, excluding lottery tickets from the mails, and prohibiting the importation of lottery matter from abroad, and to prohibit the act of causing lottery tickets to be carried, and lottery advertisements to be transferred from one State to another by any means or method.' We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States."[21]

§ 296. Bearing of the Lottery Decision on Insurance.

The holding by the court that lottery tickets are articles of commerce and may become articles of interstate commerce, has

[21] In the minority opinion it is urged that the same reasoning which had been applied to hold bills of exchange and policies of insurance not to be articles of commerce was applicable to lottery tickets. "The lottery tickets," says Chief Justice Fuller, speaking for the minority, "purports to create

undoubtedly increased the possibility that, should a federal law be enacted in regulation of insurance companies doing business in more than one State, it will be sustained by the Supreme Court. Certainly there are very great points of similarity between a policy of insurance and a lottery ticket. Like the insurance policy, the lottery ticket is a promise to pay upon the happening of a certain contingency. Lottery tickets, to be sure, do indeed freely pass from hand to hand by sale or exchange, but, though not so readily, insurance policies are also at times sold and exchanged. Furthermore, as has been already observed, should the constitutionality of a federal law in regulation of insurance be involved, it would receive the benefit of every rational doubt.

§ 297. Commerce Does not Include the Production of the Commodities Transported.

In a series of most important decisions it has been held that commerce does not begin until the goods intended for purchase, sale, or exchange in another State have begun their trip thither. That is to say, they must at least have been placed in the hands

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contractual relations, and to furnish the means of enforcing a contract right. This is true of insurance policies, and both are contingent in nature. . . . If a lottery ticket is not an article of commerce, how can it become so when placed in an envelope or box or other covering, and transported by an express company? To say that the mere carrying of an article which is not an article of commerce in and of itself nevertheless becomes such the moment it is to be transported from one State to another, is to transform a non-commercial article into a commercial one simply because it is transported. I cannot conceive that any such result can properly follow. It would be to say that everything is an article of commerce the moment it is taken to be transported from place to place, and of interstate commerce if from State to State. An invitation to dine, or to take a drive, or a note of introduction, all become articles of commerce under the ruling in this case, by being deposited with an express company for transportation. This in effect breaks down all the difference between that which is, and that which is not, an article of commerce, and the necessary consequence is to take from the States all jurisdiction over the subject so far as interstate communication is concerned. It is a long step in the direction of wiping out all traces of state lines, and the creation of a centralized government."

of the agents who are to transport them. The mere fact that goods are manufactured to be transported and sold in another or other States, or that they have been segregated in the place where produced, for that purpose, is not sufficient to make them articles of interstate commerce. In some way they must have advanced some distance upon their way outside of the State of production. It is clear, therefore, that the whole process of manufacture or production is definitely excluded from the operation of the commerce clause. "Commerce succeeds to manufacture, and is not a part of it." [22]

This subject will receive especial treatment in Chapter XLIII in which will be considered the extent of the legislative powers of the Federal Government under the commerce clause and, especially, the discussion arising under the Anti-Trust Act of 1890.

§ 298. Intent to Export not Controlling.

The fact that goods are manufactured for export does not render their manufacture an element in the interstate or foreign commercial transaction.

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[22] U. S. v. E. C. Knight Co., 156 U. S. 1; 15 Sup. Ct. Rep. 249; 39 L. ed. 325. In Kidd v. Pearson (128 U. S. 1; 9 Sup. Ct. Rep. 6; 32 L. ed. 346) the court say: "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation — the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate not only manufactures but also agriculture, horticulture, stock raising, domestic fisheries, mining — in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest or the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable

This principle is clearly laid down in Coe v. Errol.[23] In this case the court held that certain logs cut in New Hampshire and hauled to a river town for transportation to the State of Maine, but not yet actually started upon their final way to that State, had not become articles of interstate commerce. The court say: "Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them [as articles of interstate commerce] from taxation? . . . There must be a point of time when they ceased to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the State of their origin, to that of their destination."

§ 299. Interstate Commerce Includes the Sale of the Articles Imported.

It has been seen that interstate commerce does not begin until, by some definite act, the goods have started upon their trip outside the State of origin. As to the termination of interstate transportation it has been established that this does not occur until the goods transported have reached their destination, been delivered, and, either sold or taken out of their original packages in which shipped, and thus commingled with the other goods of the State.

The right to import including the right of the importer to sell the goods imported, and the right to engage in interstate and foreign commerce being a federal right, the States have no more constitutional power to restrain or regulate the sale of imported commodities by the importer than they have to prevent or regulate their being brought within the State.

This principle was first clearly declared by Marshall in Brown v. Maryland.[24] "Sale," declared the Chief Justice, "is the

result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests — interests which in their nature are and must be local in all the details of their successful management."

[23] 116 U. S. 517; 6 Sup. Ct. Rep. 475; 29 L. ed. 715.

[24] 12 Wh. 419; 6 L. ed. 678.

object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. . . . Congress has a right not only to authorize importation, but to authorize the importer to sell."

The case of Brown v. Maryland had to deal with foreign commerce and it seemed for a number of years that its application would be limited to that commerce. Indeed, that this was so was intimated as late as 1886 in Robbins v. Taxing District.[25] But in Bowman v. Northwestern Railroad,[26] decided in 1887, the reasoning indicated that the doctrine would be applied to interstate commerce, and in Leisy v. Hardin,[27] decided in 1890, this was squarely declared and has since been repeatedly affirmed.

The fact that the right to engage in commerce carries with it the right to sell the goods transported, does not, it has been held, exclude the right of the State to tax goods brought from another State still unsold, and still in their original packages, provided such goods be not discriminated against because of their having been brought into the State from another State. As to imports from foreign countries, however, the rule is that until sale in the original package, or until the breaking of the package, no state tax may be imposed. This prohibition is, however, not drawn from the commerce clause but from the express provision of the Constitution that "No State shall, without the consent of Congress, lay any impost or duty on imports or exports (Art. I, Sec. X)."

This branch of the subject will be more fully discussed elsewhere in this treatise.

§ 300. The Original Package Doctrine.

From the foregoing sections it has appeared that the State's authority over articles brought in from the other States does not attach, except for purposes of taxation, until the articles so brought in have been sold. It will also have appeared, however, from the quotations which have been made, that this rule is

[25] 120 U. S. 489; 7 Sup. Ct. Rep. 592; 30 L. ed. 694.
[26] 125 U. S. 465; 8 Sup. Ct. Rep. 689; 31 L. ed. 700.
[27] 135 U. S. 100; 10 Sup. Ct. Rep. 681; 34 L. ed. 128.

modified by the doctrine that, whether sold or not, the articles brought in lose their interstate commercial character, and full state authority at once attaches, as soon as these articles have in any way become mixed with the general mass of the property of the State to which they have been transported. As a convenient test for determining when this commingling takes place, the Supreme Court early developed the so-called "Original Package" doctrine. This doctrine is that so long as the commodity is kept in the unbroken package in which it was delivered to the carrier for transportation, no commingling with the state goods has taken place. At times this has been stated by the courts and by commentators as an absolute rule. In fact, however, as will appear from the cases which will be reviewed, the doctrine does not state a right to which the exporter is entitled, but a test which the court frequently finds it convenient to apply for determining when commingling of the imports with state goods has taken place, but which in other cases may be held inapplicable because of the character of the goods transported.

The original package doctrine was first stated by Marshall in Brown v. Maryland[28] with reference to the prohibition laid upon the States as to the taxation of exports and imports. "There must be," says the Chief Justice, "a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the articles enter the country . . . it is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."[29] And,

[28] 12 Wh. 419; 6 L. ed. 678.

[29] As already observed, and will later be more fully discussed, articles of interstate commerce are, while in their original packages and in the hands of the importer, subject to taxation by the State in which they are.

it is in this case, it will be remembered, that the doctrine is laid down that sale is the object of, and an essential ingredient of commerce.

In Bowman v. Railway Co.[30] the court had held that a State could not forbid a common carrier to bring intoxicating liquor into the State from another State or Territory except upon the conditions mentioned in the act. In Leisy v. Hardin[31] the court took the further step of declaring that the importers had the right to sell in the original packages, unopened and unbroken, articles brought into the State from another State or Territory, notwithstanding a statute of the State prohibiting the sale of such articles except for the purposes mentioned therein and under a license from the State. This statute the court held unconstitutional, saying: "Under the decision in Bowman v. Railway Co. they had the right to import beer into that State, and, in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that, in the absence of congressional permission to do so, the State had no power to interfere, by seizure or any other action, in prohibition of importation and sale by the foreign or non-resident importer."[32]

In Schollenberger v. Pennsylvania[33] the original package test was applied to interstate shipments of oleomargarine.

§ 301. Difficulties in Applying Original Package Doctrine

The original package doctrine, simple in itself, becomes at times difficult, and, indeed, impossible of strict application because it is not easy to determine what is to be considered the original package which, until broken, preserves the commodity from state control. In some cases, indeed, there is no package whatever to be broken. These difficulties are illustrated in the cases which follow.

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[30] 125 U. S. 465; 8 Sup. Ct. Rep. 689; 31 L. ed. 700.

[31] 135 U. S. 100; 10 Sup. Ct. Rep. 681; 34 L. ed. 128.

[32] Three justices dissented on the ground that the state law was a legitimate exercise of the police power.

[33] 171 U. S. 1; 18 Sup. Ct. Rep. 757; 43 L. ed. 49.

In Austin v. Tennessee,[36] decided six months after the May case, the court was confronted by a case in which there was no larger bundle or case, the articles in question — cigarettes — being shipped and transported in small paper packages, without, however, being separately addressed, these packages being taken

of American merchants will readily occur to everyone. The result would be that there might be upon the shelves of a merchant in this country, ready to be used and openly exposed for sale, commodities or merchandise consisting of articles separately wrapped and of enormous value that could not be reached for local taxation until after he had sold them, no matter how long they had been kept by the importer before selling them. It cannot be overlooked that the interpretation of the Constitution for which the plaintiffs contend would encourage American merchants and traders seeking to avoid state and local taxation, to import from abroad all the merchandise and commodities which they would need in their business. There are other considerations that cannot be ignored in determining the time at which goods imported from foreign countries lose their character as imports and may be properly regarded as part of the general mass of property in the State, subject to local taxation. If, as the plaintiffs insist, each parcel separately wrapped and marked and put in the shipping box, case, or bale, is an original package which, until sold, no matter when, would retain its distinctive character as an import, although the box, case, or bale containing them had been opened and the separate parcels all exposed for sale, what stands in the way of European manufacturers opening branch houses in this country, and selling all their goods put up in the form of separate parcels and packages, without paying anything whatever by way of taxation on their goods as property protected by the laws of the State in which they do business? Indeed, under plaintiff's view, the Constitution secures to the manufacturers of foreign goods imported into this country an immunity from taxation that is denied to manufacturers of domestic goods. An interpretation attended with such consequences ought not to be adopted if it can be avoided without doing violence to the words of the Constitution. Undoubtedly the payment of duties imposed by the United States on imports gives the importer the right to bring his goods into this country for sale, but he does not, simply by paying the duties, escape taxation upon such goods as property after they have reached their destination for use or trade, and the box, case, or bale containing them has been opened and the goods exposed to sale." "In our judgment," the court conclude, "the 'original package' in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of goods lost its distinctive character as an import and became property subject to taxation by the State as other like property situated within its limits."

Four justices dissented without, however, stating their reasons.

[36] 179 U. S. 343; 21 Sup. Ct. Rep. 132; 45 L. ed. 224.

from loose piles of such packages at the factory by the express company in baskets furnished by it, transported in such baskets, and emptied therefrom on the counters of the consignees in the States to which shipped. Here, though there was no larger tax or bale, the court declined to hold the small packages to be the "original" packages, and said that the original package, if there were one, was the basket.

The court say: "The case under consideration is really the first one presenting to this court distinctly the question whether, in holding that the State cannot prohibit the sale in the original package of an article brought from another State, the size of the package is material." After citing cases, in which, however, this question had been foreshadowed, the court continue: "The real question in this case is whether the size of the package in which the importation is actually made is to govern; or, the size of the package in which the *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different States. We hold to the latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the State. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up. But taking the words 'original package' in their literal sense, a number of so-called original package manufactories have been started through the country, whose business it is to manufacture goods for the express purpose of sending their products into other States in minute packages, that may at once go into the hands of the retail dealers and consumers, and thus bid defiance to the laws of the State against their importation and sale. In all the cases which have heretofore arisen in this court the packages were of such size as to exclude the idea that they were to go directly into the hands

of the consumer, or be used to evade the police regulations of the State with regard to the particular article. No doubt the fact that cigarettes are actually imported in a certain package is strong evidence that they are original packages within the meaning of the law; but this presumption attaches only when the importation is made in the usual manner prevalent among honest dealers, and in a *bona fide* package of a particular size. Without undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another State, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee. . . . Practically the only argument relied upon in support of the theory that these packages of ten cigarettes are original packages is derivable from the Revised Statutes, § 3392, which requires that manufacturers shall put up all cigarettes made by or for them, and sold or removed for consumption or use, in packages containing ten, twenty, fifty, or one hundred cigarettes each. This, however, is solely for the purpose of taxation — a precaution taken for the better enforcement of the internal revenue law, and to be read in connection with Section 3243, which provides that 'the payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State.' "[37]

In this Austin case, it is clear that the court is not at all sure that from the very circumstances of the case the original package doctrine was applicable; and this became still clearer in Cook v. Marshall,[38] decided in 1905, in which there was not even a basket, the small packages being shipped absolutely loose, and, presumably, shoveled into and out of the car, and delivered in that con-

[37] Four justices dissented.

[38] 196 U. S. 261; 25 Sup. Ct. Rep. 233; 49 L. ed. 471.

dition to their consignees. The court, however, held these small packages, even before opening, subject to the police and taxing powers of the State.

These cases sufficiently establish the fact that the original package doctrine is not so much a rule necessarily to be followed by the court for fixing precisely the time at which interstate commercial transactions end and the full state authority over the articles transported attaches, as it is a test which in many cases may conveniently be applied for determining this fact. And that when the nature of the case is such as to render this test inapplicable, the court will have to ascertain from other circumstances whether or not interstate commerce has ended.[39]

§ 302. Summary: General Definitions of Commerce.

By way of summary of what has gone before, the following general definitions of commerce may be given.

In County of Mobile v. Kimball[40] the court declare: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."

In Gloucester Ferry Co. v. Pennsylvania[41] the court say: "Commerce among the States consists of intercourse and traffic between their citizens and includes the transportation of persons and property and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities."

§ 303. Exclusiveness of Federal Control over Interstate Commerce.

The federal authority over interstate commerce is not in terms made exclusive, and the courts have at times varied their views as to the extent to which an exclusiveness is to be deemed implied. From the beginning the States acted upon the assumption that

[39] *Cf.* Prentice and Egan, p. 70.

[40] 102 U. S. 691; 26 L. ed. 238.

[41] 114 U. S. 196; 5 Sup. Ct. Rep. 826; 29 L. ed. 158.

they were not deprived of power to grant to persons and corporations exclusive privileges with reference to the carrying on upon land of commerce between themselves and other States; and this practice was acquiesced in by the Federal Government. As to the carrying on of interstate commerce by water, however, it seems to have been more generally held that the federal jurisdiction was exclusive. This, however, was not judicially determined until the decision of the great case of Gibbons v. Ogden.[42]

§ 304. Gibbons v. Ogden.

In this case it was held that the grant by the State of New York to an individual of an exclusive right to navigate its waters with steam vessels had no constitutional validity in so far as interstate or foreign commerce was affected. In support of this judgment, Marshall, in his opinion, laid down in general terms the doctrine that by the commerce clause, the Federal Government is granted an exclusive control of commerce between the States, and with foreign countries, and that, therefore, it is beyond the constitutional power of the States to grant, or to withhold, interstate or foreign commercial privileges.

In support of the doctrine that the grant to the Federal Government of the power to regulate interstate and foreign commerce did not exclude the States from a regulative power within the same field, it was argued by the counsel that this was the accepted doctrine with reference to the taxing power. As to this, Marshall, however, replied: "Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States an exer-

[42] 9 Wh. 1; 6 L. ed. 23.

cise of any portion of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce."

As to the enactment by the States of quarantine, health, and inspection laws, the validity of which had not been questioned, Marshall pointed out that these fall within the police powers of the States and do not evidence the possession by them of regulative authority over interstate and foreign commerce.

The precise point actually decided in Gibbons v. Ogden was that the federal authority over foreign and interstate commerce is exclusive in so far as that commerce is carried on by water. Interstate commerce upon land was not involved, and it would appear that general contemporaneous construction of the case limited its operation to commerce by water.[43]

To a certain degree, also, the doctrine laid down by Marshall was *obiter* in that it was held that the state action which was complained of was in violation of existing acts of Congress, and, therefore, was void whether the federal power over interstate commerce was held conclusive or only concurrent. But however this may be, the language of Marshall, and that of Justice Johnson in a concurring opinion, is much broader, and the case has since come to be the leading authority cited in support of the principle

[43] This is quite clearly shown by Mr. Prentice. "There was nothing new," says Prentice, "in the establishment of the rule which to most modern readers seems the great achievement of the case, that federal power over commerce is exclusive. To the extent under consideration, it had always been so regarded. . . . That the federal power was exclusive seems, . . . as the subject was then regarded, to have had little relation to monopolies of transportation, and no relation whatever to land transportation and ferriage." *Federal Control over Carriers and Corporations*, p. 68.

that the States may not in any way or to any substantial extent directly interfere with, or attempt the regulation of, commerce between the States by whatever agency that commerce may be carried on.[44]

A review of the cases which followed Gibbons v. Ogden will show, however, that the doctrine of the Supreme Court as to the exclusiveness of federal authority over commerce has not been a uniform one. Without abandoning the doctrine that the States are constitutionally disqualified from directly interfering with the regulation of commerce, the Supreme Court has at times upheld state acts which have in fact amounted to substantial interferences with interstate and foreign commerce. And, indeed, the language of the court, and even of Marshall himself in certain cases, has implied the adoption of the doctrine that the constitutionality of a state law in regulation of, or interfering with, the freedom of interstate and foreign commerce is to be tested rather by the existence of a conflicting federal statute, than by the exclusiveness of the federal jurisdiction.

In Brown v. Maryland,[45] decided three years after Gibbons v. Ogden, the court held void an act of a State requiring importers of foreign goods and persons selling the same to take out a license for which they were to pay fifty dollars. The act was held void not only as in violation of the constitutional provision forbidding the States to levy duties on imports, but as repugnant to the commerce clause, and also in conflict with the acts of Congress authorizing importation. Strictly speaking, therefore, the case did not necessarily involve the question of the exclusiveness of the federal power over interstate and foreign commerce. In the

[44] Justice Johnson, in a concurring opinion, argued that the judgment of the court should be based upon an emphatic statement of the exclusiveness of the federal authority over commerce. He said: "The power of a sovereign State over commerce . . . amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside in but one potentate; hence the grant of this power carries with it the whole subject, leaving nothing for the State to act upon."

[45] 12 Wh. 419; 6 L. ed. 678.

opinion which Marshall rendered that doctrine appears, however, to be accepted. "Any charge," he says, "on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce." And again, "We cannot admit that [the States' power of taxation] may be used so as to obstruct the free course of a power given to Congress."[46]

In Wilson v. Blackbird Creek Co.,[47] decided in 1829, we find a much less strict interpretation of the exclusiveness of the federal commercial power. In this case was upheld a state law authorizing the construction of a dam on a navigable stream. It being contended that navigation and, therefore, commerce was interfered with, Marshall, apparently accepting a doctrine of concurrent power, held that inasmuch as Congress had not legislated upon the subject, the law authorizing the dam was valid. He said: "If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over these small navigable creeks into which the tide flows, we should not feel much difficulty in saying that a state law coming in conflict with such act would be void. But Congress has passed no such act." And, later on: "We do not think that the act can, under all circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, as being in conflict with any law on the subject."

It is difficult to harmonize this language with that used only a few years before in Gibbons v. Ogden and Brown v. Maryland, or, indeed, with that employed in cases decided a few years later. Neither in the Blackbird Creek case itself nor in the later cases does Marshall indicate that he intends or had intended to declare a doctrine different from that earlier asserted. It would seem, therefore, that, though not so expressed, Marshall held that the damming of the creek, the purpose of which was to reclaim certain marsh lands was a legitimate exercise by the State of a police

[46] A dissenting opinion was filed by Justice Thompson.
[47] 2 Pet. 245; 7 L. ed. 412.

power which, in the absence of express congressional prohibition, might be justified even though navigation were to some extent evidently affected.

§ 305. New York v. Miln.

In New York v. Miln,[48] decided in 1837, the relation of the States' police powers to the regulation of commerce was carefully considered. In this case a state law was upheld which required masters of all vessels arriving at the port of New York to make certain reports as to passengers carried, and imposed certain penalties in case this was not done. The opinion of the court was rendered by Justice Barbour. In this opinion it is declared that, "We shall not enter into any examination of the question whether the power to regulate commerce be or be not exclusive of the States, because the opinion which we have formed renders it unnecessary, in other words we are of opinion that the act is not a regulation of commerce, but of police, and that being thus considered, it was passed in the exercise of a power which rightfully belonged to the States." This police power is, however, so broadly defined, as in effect to give to the States a concurrent power of legislating with reference to matters subject to federal legislation. "Whilst a State is acting within the legitimate scope of its powers as to the end to be attained," the opinion declares, "it may use whatever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by Congress acting under a different power, subject only, say the court, to this limitation, that in the event of collision the law of the State must yield to the law of Congress. . . . Even then, if the section of the act [of the State] in question could be considered as partaking of the nature of a commercial regulation, the principle here laid down would save it from condemnation, if no such collision [with an act of Congress] exist."

From this language it is apparent that the test as to the validity of the state law is not as to the exclusiveness of the federal au-

[48] 11 Pet. 102; 9 L. ed. 648.

thority, but as to the existence of a countervailing act of Congress. In other words, the concurrent theory is, to this extent, adopted.

In a dissenting opinion Justice Story argued strongly for the unconstitutionality of the state law and the exclusiveness of the federal authority and asserted that Marshall, before whom the case was first argued, had been in agreement with him. The existence of police powers in the States he admitted, but not that these powers might ever be used for the regulation of matters placed within the exclusive jurisdiction of the United States. "A State," he declared, "cannot make a regulation of commerce to enforce its health laws, because it is a means drawn from its authority. It may be admitted that it is a means adopted to the end, but it is quite a different question whether it be a means within the competency of the state jurisdiction."

§ 306. License Cases.

The next important construction of the extent of the federal authority over commerce was that given in the group of cases known as the License Cases,[49] decided in 1846. These cases involved state laws fixing conditions of, and requiring licenses for, the sale of certain goods imported from other States. The justices, though unanimous in upholding the state laws, were divided as to the grounds upon which their validity should be vested. By several the concurrent theory was relied upon; by others the police power of the States; while, in some cases, both of these grounds were advanced. There was not, however, a majority of the court in support of either one of these positions. It is remarkable, however, that no dissenting opinion was filed in advocacy of the exclusive power of the Federal Government.

The concurrent theory was most clearly and definitely stated by Taney in his opinion. He said: "The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet, in my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations

[49] 5 How. 504; 12 L. ed. 256.

§ 307. Passenger Cases.

Two years after the License Cases, the court was again called upon, in the so-called Passenger Cases,[50] to consider the regulative powers of the States with reference to foreign and interstate commerce. Here there was a departure from the doctrine of New York v. Miln, a law of New York being held void which authorized the state health commissioners to collect certain fees from captains of ships arriving at the ports of the State; and a law of Massachusetts annulled which required captains of ships to give certain bonds as to immigrants landed, and which provided for the payment of a small sum by each immigrant.

In these Passenger Cases, as in the License Cases, no opinion representing that of a majority of the court was rendered, the justices preparing individual arguments in support of their several positions. Justice McLean asserted emphatically the exclusiveness of the federal jurisdiction. Justice Wayne agreed as to this, but said that it was not necessary to argue it in the cases at bar. The three other justices, concurring in the judgment that the laws in question were in violation of existing federal laws and treaties, did not commit themselves upon the question of the exclusiveness of the federal power. Chief Justice Taney in a dissenting opinion argued that the state laws were valid as a proper exercise of the States' police power. Justice Woodbury, also dissenting, reaffirmed the doctrine declared by him in the License Cases, and held the laws valid as local in nature and operation.

§ 308. Cooley v. Port Wardens.

In Cooley v. Port Wardens,[51] decided in 1851, the Supreme Court, three justices dissenting, accepted the principle that had been suggested by Webster and approved by Justice Woodbury, and upheld a pilotage law of Pennsylvania on the ground that, though it was a regulation of commerce, it was with reference to a matter properly lending itself to local state control, and one for the regulation of which Congress had not legislated. Justice

[50] 7 How. 283; 12 L. ed. 702.
[51] 12 How. 299; 13 L. ed. 996.

Curtis, delivering the opinion of the court, said: "When the nature of a power like this [the commerce power] is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say that they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce, embraces a vast field, containing not only many but exceedingly various subjects, quite unlike in their nature, some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. Either absolutely to affirm, or deny, that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable to but a part. . . . It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots." [52]

The doctrine of Cooley v. Port Wardens is, at the present time, the accepted doctrine of the Supreme Court. In Bowman v. R. R. Co.[53] the doctrine is declared to be firmly established.[54]

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[52] Justice McLean, in a dissenting opinion, restated his doctrine of the exclusiveness of the federal power, including such matters of local regulation as that of pilotage. Justice Daniel, though concurring in the judgment rendered, declared that he did so because this was a matter which the States had never surrendered to the Federal Government, and which was not implied in the commercial power which had been granted to that government.

[53] 125 U. S. 465; 8 Sup. Ct. Rep. 689; 31 L. ed. 700.

[54] "The doctrine now firmly established is that where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, or improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority; but when the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State to another, Congress can alone act upon

The rule thus stated as to the distinction between subjects requiring general and those necessitating, or at least rendering highly desirable, local regulation, is a simple and rational one. It is, however, one which, in application, has not infrequently given rise to considerable difficulty, there being no definite *criteria* for distinguishing between these two classes of subjects. This has made it necessary that each case should be determined by itself, the Supreme Court in each instance deciding whether the state law in question is, or is not, regulative of a matter properly requiring national control.[55]

§ 309. Subjects of Local Regulation by the States.

Among the more important subjects which, it has been held, may, in the absence of federal legislation, be controlled by the States, because they lend themselves to local regulation, are ferries, bridges, pilotage, and harbor regulations.

The purpose of this treatise which is the determination and statement of the general principles of United States constitutional law does not require us to review in any detail the adjudications of the Supreme Court as to these several subjects. As has been said, each case has to be decided upon its own merits.

The general rule governing all the cases is, perhaps, best stated and the authorities summarized, in Covington, etc., Bridge Co. v. Kentucky.[56]

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it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free."

[55] Thayer in a note in his *Cases on Constitutional Law*, p. 2190, points out that this question as to the need for local or national regulation is, inherently, a legislative and not a judicial one.

[56] 154 U. S. 204; 14 Sup. Ct. Rep. 1087; 38 L. ed. 962. "The adjudications of this court with respect to the power of the States over the general subject of commerce are divisible into three classes. First, those in which the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the States cannot interfere at all. The first class, including all those wherein the States have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the State, and while the regulations of the State may affect interstate commerce indirectly, their

§ 310. The Police Powers of the States and Commerce.

Very closely related to the authority of the States to legislate with reference to commercial matters of a local character, is the power of the States, in the exercise of their police powers to enact and enforce measures which incidentally, but often substantially, affect interstate commerce.

The distinction that is drawn between these police powers of the States, and their authority to enforce local commercial regulations is that, in the absence of countervailing federal legislation, the latter are valid even though conceded to bear directly upon interstate or foreign commerce, whereas the police regulations are only valid

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bearing upon it is so remote that it cannot be termed in any just sense an interference. Within the second class of cases — those of what may be termed concurrent jurisdiction — are embraced laws for the regulation of pilots (Cooley v. Philadelphia Port Wardens, 12 How. 299; 13 L. ed. 996; Pacific Mail SS. Co. v. Joliffe, 2 Wall. 450; 17 L. ed. 805; *Ex parte* McNiel, 13 Wall. 236; 20 L. ed. 624; Wilson v. McNamee, 102 U. S. 572; 26 L. ed. 234); quarantine and inspection laws and the policing of harbors (Gibbons v. Ogden, 9 Wheat, 1; 6 L. ed. 23; New York v. Miln, 11 Pet. 102; 9 L. ed 648; Turner v. Maryland, 107 U. S. 38; 2 Sup. Ct. Rep. 44; 27 L. ed. 370; Morgan's L. & T. R. & SS. Co. v. Louisiana Board of Health, 118 U. S. 455; 6 Sup. Ct. Rep. 1114; 30 L. ed. 237); the improvement of navigable channels (Mobile Co. v. Kimball, 102 U. S. 691; 26 L. ed. 238; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678; 2 Sup. Ct. Rep. 185; 27 L. ed. 442; Huse v. Glover, 119 U. S. 543; 7 Sup. Ct. Rep. 313; 30 L. ed. 487); the regulation of wharves, piers and docks (Cannon v. New Orleans, 20 Wall. 577; 22 L. ed. 417; Keokuk N. L. Packet Co. v. Keokuk, 95 U. S. 80, 24 L. ed. 377; Northwestern U. Packet Co. v. St. Louis, 100 U. S. 423; 25 L. ed. 688; Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg, 105 U. S. 559; 26 L. ed. 1; Parkersburg & O. R. Transp. Co. v. Parkersburg, 107 U. S. 691; 2 Sup. Ct. Rep. 732; 27 L. ed. 584; Ouachita & M. R. Packet Co. v. Aiken, 121 U. S. 444; 7 Sup. Ct. Rep. 907; 30 L. ed. 976); the construction of dams and bridges across navigable waters of a State (Wilson v. Black Bird Creek Marsh Co., 2 Pet. 245; 7 L. ed. 412; Cardwell v. American River Bridge Co., 113 U. S. 205; 5 Sup. Ct. Rep. 423; 28 L. ed. 959; Pound v. Turck, 95 U. S. 459; 24 L. ed. 525), and the establishment of ferries (Conway v. Taylor, 1 Black, 603). But wherever such laws, instead of being of a local nature and not affecting interstate commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammeled, and the case falls within the third class — of those laws wherein the jurisdiction of Congress is exclusive. (Brown v. Houston, 114 U. S. 622; 5 Sup. Ct Rep. 1091; 29 L. ed. 257; Bowman v. Chicago & N. W. R. Co., 125 U. S. 465; 8 Sup. Ct. Rep. 689; 31 L. ed. 700.)"

when their influence upon interstate or foreign commerce is an incidental, indirect one. In other words, as to matters of local concern, the States are recognized to have a concurrent legislative power in the fields of interstate and foreign commerce; while as to police measures (and the same is true as to tax laws or other state laws for the regulation of domestic commerce) the States have an authority which is not concurrent with that of the United States, but which is, when kept within its proper sphere, exclusive of federal control. Thus, local regulations even though they operate directly upon interstate and foreign commerce are valid unless and until there is federal legislation concerning the same subject. Tax laws, laws for the regulation of domestic commerce and police regulations, upon the other hand, have no constitutional validity whatever if they operate directly and primarily as a restraint upon interstate or foreign commerce as such.

To the writer it would seem that the foregoing distinction between the concurrent local legislative powers and the police powers of the States with reference to interstate and foreign commerce is an unnecessary and confusing one, for the fact is to be noted that all of the local regulations which have been referred to in the preceding section may properly be described as police regulations and justified as such. If, and when, so justified, it will be possible for the courts, without changing substantially the effect of its holdings, to accept finally and completely the doctrine of the exclusiveness of the federal authority over interstate and foreign commerce, and base the validity of local state commercial regulations not upon a state concurrent legislative power as to local matters, but upon the States' police or other reserved powers.[56a] However, the courts still recognize the distinction between the two sources of state power to affect interstate commerce by their legislation, and this practice is, therefore, here followed.

That a state law which, in its essential nature, is a legitimate exercise of the police power is not rendered invalid by reason of the fact that interstate commerce is thereby incidentally affected is well established.

[56a] See Cooke, *Commerce Clause*, § 55.

In Hennington v. Georgia,[57] in which case was upheld the validity of a state statute prohibiting the running of freight trains on Sundays, the court, after a review of adjudged cases, say: "These authorities make it clear that the legislative enactments of the States, passed under their admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people, but which, by their necessary operation, affect to some extent or for a limited time the conduct of commerce among the States, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce, and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the powers which the States reserved, and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight." [58]

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[57] 163 U. S. 299; 16 Sup. Ct. Rep. 1086; 41 L. ed. 166.

[58] This equality of treatment of interstate and domestic commerce is not, it is to be observed, an infallible test as to the validity of state law affecting interstate commerce. Thus in Robbins v. Taxing District of Shelby Co. (120 U. S. 489; 7 Sup. Ct. Rep. 592; 30 L. ed. 694) the court were obliged to abandon this rule. The court there say: "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers — those of Tennessee and those of other States — that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of The State Freight Tax Cases (15 Wall. 232; 21 L. ed. 146)."

This interference with interstate and foreign commerce, it is to be emphasized, is permitted only when the necessities and the convenience of the public seem to demand it and when the regulation provided for is a reasonable and just one. In other words, the States may not, under the guise of an exercise of their police powers, attempt what in effect amounts to a direct regulation of interstate and foreign commerce, or impose an unnnecessary or arbitrary burden upon interstate carriers. As will later appear the same principle applies to the exercise of the other powers of the States, as for example, the power to tax, or to regulate domestic commerce. In the exercise of these powers it is often the case that interstate and foreign commerce are indirectly and even substantially affected. But in no case can regulation of interstate and foreign commerce be the direct or primary aim of the State's action. If this is the aim or effect, no support for the validity of the law may be obtained by calling the law a police regulation. "The substantial question in any given case is," say the court in Henderson v. Mayor,[59] "whether or not there is a valid exercise of a power reserved to the States, whether or not within the scope of the 'police power.' It has been well said as to the police power, that 'no definition of it and no urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution. Nothing is gained in the argument by calling it the police power.'" [60]

An interesting and recent case in which it is shown that the court will not permit interstate carriers to be subjected to unnecessary or unreasonable police regulations is Houston, etc., R. R. Co. v. Mayes.[61] In this case it was held that a state law which penalized the failure of a railway company to furnish shippers with cars within a certain number of days after notice, and permitted no excuse except inability arising from strikes or other public calamity, was unconstitutional in so far as it applied to

[59] 92 U. S. 259; 23 L. ed. 543.

[60] *Cf.* L. S. & M. S. Ry. Co. v. Ohio, 173 U. S. 285; 19 Sup. Ct. Rep. 465; 43 L. ed. 702.

[61] 201 U. S. 321; 26 Sup. Ct. Rep. 491; 50 L. ed. 772.

interstate carriers. The court say: "Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature."

It is thus evident that the federal court will examine a state police regulation not only with reference to the fact whether or not it amounts to a direct regulation of interstate commerce, but whether its provisions are in themselves sufficiently reasonable, practicable, and just, as to furnish an excuse and justification for the incidental interference with interstate commerce which their enforcement will necessitate.

Finally, with reference to the police powers of the States and interstate commerce, it is to be observed that however incidental their effect upon such commerce they have, of course, no validity in so far as they conflict with existing federal statutes. In Houston v. Mayes[62] the court say: "Of course such [police] rules are inoperative if conflicting with regulations upon the same subject enacted by Congress."

§ 311. Applications of the Doctrine of the Police Powers of the State in Their Relation to Interstate Commerce.

The general principles governing the exercise of police powers by the States in their relation to interstate commerce have been stated. It remains but to enumerate certain of the applications which, in specific instances, these doctrines have received.

§ 312. State Regulation of Interstate Trains.

A series of cases have been decided by the Supreme Court with reference to the validity of state laws seeking to control the manner of running and operating trains. When the provisions of these laws have been found reasonably necessary for the protection and convenience of the people, and not discriminative against interstate trains, they have been upheld in their application to such interstate trains. Thus state laws have been sustained which

[62] 201 U. S. 321; 26 Sup. Ct. Rep. 491; 50 L. ed. 772.

have forbidden the running of freight trains on Sunday;[63] forbidding heating cars by stoves;[64] requiring trains to stop at county seats;[65] and other populous centers;[66] requiring locomotive engineers to be examined and licensed by the state authorities;[67] requiring such engineers to be examined from time to time with respect to their ability to distinguish colors;[68] requiring telegraph companies to receive dispatches and to transmit and deliver them with due diligence, as applied to messages from outside the State;[69] requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations;[70] forbidding the consolidation of parallel or competing lines of railway;[71] regulating the heating of passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto;[72] providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers, which would have existed if no contract had been made;[73] and declaring that when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route,

[63] Hennington v. Georgia, 163 U. S. 299; 16 Sup. Ct. Rep. 1086; 41 L. ed. 166.

[64] N. Y., etc., Ry. v. N. Y., 165 U. S. 628; 17 Sup. Ct. Rep. 418; 41 L. ed. 853.

[65] Gladsen v. Minnesota, 166 U. S. 427; 17 Sup. Ct. Rep. 627; 41 L. ed. 1064.

[66] Lake Shore, etc., Ry. v. Ohio, 173 U. S. 285; 19 Sup. Ct. Rep. 465; 43 L. ed. 702; Wisconsin M. & P. Ry. Co. v. Jacobson, 179 U. S. 287; 21 Sup. Ct. Rep. 115; 45 L. ed. 194.

[67] Smith v. Alabama, 124 U. S. 465; 8 Sup. Ct. Rep. 564; 31 L. ed. 508.

[68] Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96; 9 Sup. Ct. Rep. 28; 32 L. ed. 352.

[69] Western Union Telegraph Co. v. James, 162 U. S. 650; 16 Sup. Ct. Rep. 934; 40 L. ed. 1105.

[70] Chicago & N. W. R. Co. v. Fuller, 17 Wall. 560; 21 L. ed. 710.

[71] Louisville & N. R. Co. v. Kentucky, 161 U. S. 677; 16 Sup. Ct. Rep. 714; 40 L. ed. 849.

[72] New York, N. H. & H. R. Co. v. New York, 165 U. S. 628; 17 Sup. Ct. Rep. 418; 41 L. ed. 483.

[73] Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133; 18 Sup. Ct. Rep. 289; 42 L. ed. 688.

he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent.[74] In none of these cases was it thought that the regulations were unreasonable, or operated in any just sense as a restriction upon interstate commerce.[75]

From the foregoing it will appear that some of the state police regulations which have been sustained in their application to interstate traffic have had for their aim not the health, morals, and safety of the people of the States enacting them, but simply public convenience. In Lake Shore, etc., Ry. Co. v. Ohio,[76] in which prior decisions upon this point are carefully considered, the court say: "The power of the State, by appropriate legislation, to provide for the public convenience, stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals, or the public safety. Whether legislation of either kind is inconsistent with any power granted to the General Government is to be determined by the same rules."

But in Illinois Central Ry. Co. v. Illinois[77] a state law was held void as unnecessarily restraining interstate commerce which required trains to run out of their regular routes in order to make certain specified stops. So also in Mississippi Railroad Com. v. Illinois Central Ry. Co.[78] was held void an order of a state railroad commission requiring a railway company to stop its interstate trains at a specified county seat, where proper and adequate passenger facilities were already otherwise provided. In this case the fact that the interstate trains were carrying the mails is given as one of the reasons why they should not be delayed except for substantial reasons. The court say: "The fact that the

[74] Richmond & A. R. Co. v. R. A. Patterson Tobacco Co., 169 U. S. 311; 18 Sup. Ct. Rep. 335; 42 L. ed. 759.

[75] This summary is substantially taken from that given by the court in Missouri Pacific Ry. Co. v. Larabee Flour Mills Co., 211 U. S. 612; 29 Sup. Ct. Rep. 214; 53 L. ed. 352.

[76] 173 U. S. 285; 19 Sup. Ct. Rep. 465; 43 L. ed. 702.

[77] 163 U. S. 142; 16 Sup. Ct. Rep. 1096; 41 L. ed. 107.

[78] 203 U. S. 335; 27 Sup. Ct. Rep. 90; 51 L. ed. 209.

company has contracts to transport the mails of the United States within a time which requires great speed for the trains carrying them, while not conclusive, may still be considered upon the general question of the propriety of stopping such trains at certain stations within the boundaries of a State." Also the impairment of the ability of the road in question to compete with its rivals was considered. "A wholly unnecessary, even though a small obstacle," the court say, "ought not, in fairness, to be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals." Finally, summarizing its position, the court declare: "We by no means intend to impair the strength of the previous decisions of this court on the subject, nor to assume that the interstate transportation, either of passengers or freight, is to be regarded as overshadowing the rights of the residents of the States through which the railroad passes to adequate railroad facilities. Both claims are to be considered, and, after the wants of the residents within the State or locality through which the road passes have been adequately supplied, regard being had to all the facts bearing upon the subject, they ought not to be permitted to demand more, at the cost of the ability of the road to successfully compete with its rivals in the transportation of interstate passenger and freight." So also in Atlantic Coast Line Ry. Co. v. Wharton[79] was held void an order made under state authority as to the stoppage on signal of certain fast mail trains, the argument being that sufficient service was otherwise provided between the points in question.

In Hall v. De Cuir[80] the court held void as to interstate carriers a state law which prohibited any discrimination against passengers carried within the States, on account of race or color, the argument being that such a regulation in its operation would necessarily affect not merely the local portion of the interstate traffic, but the entire interstate trip.[81]

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[79] 207 U. S. 328; 28 Sup. Ct. Rep. 121; 52 L. ed. 230.

[80] 95 U. S. 485; 24 L. ed. 547.

[81] The statute in question, the court say, "does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without or

In McNeill v. Southern Railway Co.[82] the Supreme Court held invalid an order of a state authority compelling a railway, engaged in interstate commerce, to deliver cars containing interstate shipments beyond its own right of way to a private siding. This order, it was declared, "manifestly imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce."

However in Missouri Pacific Ry. Co. v. Larabee Flour Mills Co.[83] the court upheld an order of a state authority addressed to an interstate carrier to resume the transfer and return of cars between the railway line and the mill of a particular shipper on payment of customary charges. Two dissenting justices held that the case was not to be distinguished from McNeill v. Southern Ry. Co., but the majority held that the order in question was simply to compel the performance by the carrier of its common-law obligation to treat all shippers alike.

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goes out from within. While it purports to control only the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced. It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. . . . No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business; and, to secure it, Congress, which is untrammeled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

As to the constitutionality of state laws fixing rates for interstate carriers as to the portion of the traffic within the States, see Section 343.

[82] 202 U. S. 543; 26 Sup. Ct. Rep. 722; 50 L. ed. 1142

[83] 211 U. S. 612; 29 Sup. Ct. Rep. 214; 53 L. ed. 352.

In Louisville & Nashville Ry. Co. v. Central Stock Yards Co.[84] was held void a provision of the Constitution of Kentucky so applied as to compel a railroad company to receive live stock tendered to it outside of the State, to be delivered to a certain point not its own terminus but in physical connection therewith.

State laws regulating the prompt delivery of interstate telegraph messages, have generally been upheld. In Western Union Tel. Co. v. James[85] the court say: "The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company."

§ 313. State Inspection Laws.

State inspection laws in their application to interstate commerce are sustained in so far as they are reasonable regulations in behalf of the health, safety, and morality of the inhabitants of the States enacting them, or for their protection against fraud, and do not conflict with existing federal statutes. In Gibbons v. Ogden[86] the court say: "The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the General Government; all of which can be most advantageously exercised by the States themselves."

It will later be seen that when Congress has specifically or inferentially recognized a commodity as a legitimate article of interstate commerce, it may not be excluded by a State from its borders whether by an inspection or other police regulation. And even as to all other articles with reference to which there has been no federal pronouncement, the requirements of a state inspection

[84] 212 U. S. 132; 29 Sup. Ct. Rep. 246; 53 L. ed. 441.
[85] 162 U. S. 650; 16 Sup. St. Rep. 934; 40 L. ed. 1105.
[86] 9 Wh. 1; 6 L. ed. 23.

law must be reasonable in its provisions. "The only question within the competency of the state authorities, is," as Prentice and Egan say, "whether the article examined is, according to commercial usages of the world, in a fit condition for commerce. It does not belong to the State to decide what articles shall be considered legitimate subjects of trade, nor to make an examination of imported articles for any other purpose than that of protecting the market."[87]

An examination of a few of the more recent cases will sufficiently illustrate the established doctrines of the Supreme Court as to state inspection laws.

In Turner v. Maryland[88] a state inspection law with reference to tobacco was upheld, which prescribed the dimensions of the hogshead in which tobacco raised in Maryland should be packed, that the hogsheads should be delivered to one of the state tobacco warehouses for inspection, and that there should be a charge of outage to reimburse the State for the inspection expenses incurred. To the contention made that the law could not properly be termed an inspection law because no provision was made for the opening of the hogsheads and examination of their contents, the court say: "Recognized elements of inspection laws have always been: quality of the article, form, capacity, dimensions and weight of package, mode of putting up, and marking and branding of various kinds, all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should coexist in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirement or the inspection may be made to extend to all of the above matters. When all are prescribed, and then inspection as to quality is dropped out, leaving the rest in force, it cannot be said to be a necessary legal conclusion, that the law has ceased to be an inspection law."

[87] *The Commerce Clause of the Constitution*, p. 155.
[88] 107 U. S. 38; 2 Sup. Ct. Rep. 44; 27 L. ed. 370.

In People v. Compagnie Générale Trans-Atlantique,[89] decided at the same time as Turner v. Maryland, the court held void as a regulation of commerce a state law, alleged to be an inspection measure, imposing a tax on every passenger, not a citizen of the United States, from a foreign country landing in the port of New York. In this case it was squarely held that inspection laws, and the words "imports" and "exports" as used in Article I, Section X, Clause 2, of the Constitution, have reference to property exclusively, and not to persons. "We feel quite safe in saying," declare the court, "that neither at the time of the formation of the Constitution nor since has any inspection law included anything but personal property as a subject of its operation. Nor has it ever been held that the words imports and exports, are used in that instrument as applicable to free human beings by any competent judicial authority."

In addition the court go on to say, the law in question is invalid in that it "goes far beyond any correct view of the purpose of an inspection law. The commissioners are 'To inspect all persons arriving from any foreign country to ascertain who among them are habitual criminals, or pauper lunatics, idiots or imbeciles . . . or orphan persons without means or capacity to support themselves and subject to become a public charge.' . . . It may safely be said that these are matters incapable of being satisfactorily ascertained by inspection. What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected or applying to it at once some crucial test. When testimony or evidence is to be taken and examined, it is not inspection in any sense whatever. . . . Another section provides for the custody, the support and the treatment for disease, of these persons, and the retransportation of criminals. Are these inspection laws? Is the ascertainment of the guilt of a crime to be made by inspection? In fact, these statutes differ from those heretofore held void, only in calling them in their caption 'inspection laws,' and in providing for payment for any surplus, after the support of paupers, criminals and

[89] 107 U. S. 59; 2 Sup. Ct. Rep. 87; 27 L. ed. 383.

diseased persons, into the Treasury of the United States; a surplus which, in this enlarged view of what are the expenses of an inspection law, it is safe to say will never exist. A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of the word, by calling it so in the title."

In Minnesota v. Barber[90] was involved a state law passed as an inspection measure which required as a condition of sale of fresh meats in the State that the animals from which such meats were taken should have been inspected in the State before being slaughtered. This was a law which, clearly, would be practically prohibitive of the importation of fresh meat from other States, and the law was very properly held void. "If," the court say, "this legislation does not make such discrimination against the products and business of Minnesota, as interferes with and burdens commerce among the several States, it would be difficult to enact legislation that would have that result."

The court also take occasion to repeat that a law, which in its operation, whatever its terms, imposes a burden upon interstate commerce is not to be sustained simply because the statute imposing it applies to all the people of all the States including those of the enacting State.[91]

In Scott v. Donald[92] it was held that where a State recognizes as lawful the manufacture, sale, and use of intoxicating liquors, it cannot discriminate against such articles brought in from other States. "It is not an inspection law," say the court. "The prohibition of the importation of the wines and liquors of other States by citizens of South Carolina for their own use is made absolute, and does not depend on the purity or impurity of the articles."

In Patapsco Guano Co. v. Board of Agriculture[93] and Asbell v.

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[90] 136 U. S. 313; 10 Sup. Ct. Rep. 862; 34 L. ed. 455.

[91] See also Brimmer v. Rebman, 138 U. S. 78; 11 Sup. Ct. Rep. 213; 34 L. ed. 862.

[92] 165 U. S. 58; 17 Sup. Ct. Rep. 265; 41 L. ed. 632.

[93] 171 U. S. 345; 18 Sup. Ct. Rep. 862; 43 L. ed. 191.

Kansas[94] the various adjudications of the Supreme Court with reference to state inspection laws are summarized and reviewed.

§ 314. State Quarantine Laws.

The enactment and enforcement by the States of quarantine laws, whether with reference to persons or to property, has given rise to numerous cases in which their constitutionality as tested by the commerce clause has been considered. Quarantine laws are, of course, but a variety of police laws, and their validity is determined as such. That is to say, as declared in Railroad Co. v. Husen,[95] "while for the purpose of self-protection it [the State] may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection." In Railroad Co. v. Husen was in question an act of the State of Missouri which provided that "No Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this State between the first day of March and the first day of November in each year by any person or persons whatever." This act, claimed to be a quarantine measure, the court held void, saying: "The statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and December [November] 1 in any year, no matter whether they are free from disease or not; no matter whether they may do an injury to the inhabitants of the State or not.' . . . Such a statute, we do not doubt, it is beyond the power of a State to enact."

In Morgan's L. & T. R., etc., Co. v. Louisiana Board of Health[96] a state law was upheld as a reasonable quarantine measure, though admitted to be, in a measure, a regulation of commerce.

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[94] 209 U. S. 251; 28 Sup. Ct. Rep. 485; 52 L. ed. 778.

[95] 95 U. S. 465; 24 L. ed. 527.

[96] 118 U. S. 455; 6 Sup. Ct. Rep. 1114; 30 L. ed. 237.

In Rasmussen v. Idaho[97] was sustained a law of a State authorizing the Governor thereof, when he had reason to believe that there is an epidemic of infectious disease of sheep in localities outside of the State, to investigate the matter, and if he finds that the disease exists, to make a proclamation declaring such localities infected and prohibiting the introduction therefrom of sheep into the State, except under such restrictions as may seem proper. Distinguishing the act from that held void in the Husen case, the court say: "It will be perceived that this is not a continuous act, operating year after year irrespective of any examination as to the actual facts, but is one contemplating in every case investigation by the chief executive of the State before any order of restraint is issued. Whether such restraint shall be total or limited, and for what length of time, are matters to be determined by him upon full consideration of the condition of the sheep in the localities supposed to be affected. The statute was an act of the State of Idaho, contemplating solely the protection of its own sheep from the introduction among them of an infectious disease, and providing for only such restraints upon the introduction of sheep from other States as in the judgment of the State was absolutely necessary to prevent the spread of disease. The act therefore is very different from the one presented in Hannibal & St. J. R. Co. v. Husen (95 U. S. 465; 24 L. ed. 527) and is fairly to be considered a purely quarantine act, and containing within its provisions nothing which is not reasonably appropriate therefor."

In Smith v. St. Louis, etc., Ry. Co.[98] were sustained quarantine regulations established by the governor of the State on recommendation of a live stock commission in pursuance of a law whereby the importation of all cattle from the State of Louisiana for a certain period was prohibited, because the commission had reason to believe that anthrax had or was liable to break out in that State.

In Reid v. Colorado[99] was sustained a state law prohibiting

[97] 181 U. S. 198; 21 Sup. Ct. Rep. 594; 45 L. ed. 820.
[98] 181 U. S. 248; 21 Sup. Ct. Rep. 603; 45 L. ed. 847.
[99] 187 U. S. 137; 23 Sup. Ct. Rep. 92; 47 L. ed. 108.

the importing of cattle from south of the thirty-sixth parallel of north latitude between certain dates, unless first kept for ninety days at some State north of that parallel or unless a certificate of freedom from contagious disease had been obtained from the state veterinary sanitary board. These provisions, were, in view of the surrounding circumstances, held to be reasonable sanitary precautions.

In Compagnie Francaise, etc. v. State Board of Health of Louisiana[1] the subject of state quarantine was again carefully considered, and especially in its relation to the existing immigration and quarantine acts of the General Government. These federal laws, it was held, were not intended to and did not abrogate the existing state quarantine systems.

§ 315. Federal Quarantine Laws.

No legislative power with reference to quarantine is specifically given to the Federal Government by the Constitution, but that government has very broad powers on the subject as incidental to its control of foreign and interstate commerce, admiralty and maritime matters, and foreign relations. To only a moderate extent, however, has this federal power been exercised.[2]

§ 316. State Game Laws.

Wild game within a State is not, until reduced to possession, private property, but belongs to the State, which is conceded to have a police power to regulate the times and methods by which it may be captured and killed, or when taken, may be sold. In their efforts to protect their game supplies the States have at times enacted game laws the validity of which has been contested as being regulations of interstate commerce. An examination of the case of Geer v. Connecticut[3] will sufficiently illustrate the points involved.

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[1] 186 U. S. 380; 22 Sup. Ct. Rep. 811; 46 L. ed. 1209.

[2] See *American Law Review*, XLIII, 382, article "Federal Quarantine Laws," for an account of this legislation.

[3] 161 U. S. 519; 16 Sup. Ct. Rep. 600; 40 L. ed. 793.

In this case the law in question declared it unlawful to have in possession game for transportation beyond the State, even though such game had been lawfully killed during the "open" season. Thus the question was whether the State could permit such game to be killed and used within the State, and yet forbid its transportation to another State. After a careful examination of the nature of the State's ownership and control of wild game, the court say:

"The foregoing analysis of the principles upon which alone rests the right of an individual to acquire a qualified ownership in game, and the power of the State, deduced therefrom, to control such ownership for the common benefit, clearly demonstrates the validity of the statute of the State of Connecticut here in controversy. The sole consequence of the provision forbidding the transportation of game killed within the State, beyond the State, is to confine the use of such game to those who own it, the people of that State. The proposition that the State may not forbid carrying it beyond her limits involves, therefore, the contention that a State cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other States to participate in that which they do not own. It was said in the discussion at bar, although it be conceded that the State has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of its people, inasmuch as the State has here chosen to allow the people within her borders to take game, to dispose of it, and thus cause it to become an object of state commerce, as a resulting necessity such property has become the subject of interstate commerce, hence controlled by the provisions of U. S. Const. art. 1, § 8. But the errors which this argument involves are manifest. It presupposes that where the killing of game and its sale within the State are allowed, it thereby becomes commerce within the legal meaning of that word. In view of the authority of the State to affix conditions to the killing and sale of game, predicated as is this power on the peculiar nature of such property and its common ownership by all the citizens of the State, it may well be doubted whether commerce

is created by an authority given by a State to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the State. The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose. The qualification which forbids its removal from the State necessarily entered into and formed part of every transaction on the subject, and deprived the mere sale or exchange of these articles of that element of freedom of contract and of full ownership which is an essential attribute of commerce. Passing, however, as we do, the decision of this question, and granting that the dealing in game killed within the State, under the provision in question, created internal state commerce, it does not follow that such internal commerce becomes necessarily the subject matter of interstate commerce, and therefore under the control of the Constitution of the United States."

And in conclusion the court say: "The power of a State to protect by adequate police regulation its people against the adulteration of articles of food . . . although in doing so commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs in common to all the people of the State, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the State and subject to the conditions which it may deem best to impose for the public good."

§ 317. The States May Absolutely Exclude from Their Borders only such Articles as Are Intrinsically not Merchantable or not Legitimate Articles of Commerce.

In the exercise of their police powers the States may absolutely exclude from their borders only such articles as are in themselves not merchantable or legitimate articles of commerce.

In Bowman v. Chicago & Northwestern R. Co.[4] the court say:

[4] 125 U. S. 465; 8 Sup. Ct. Rep. 689; 31 L. ed. 700.

"Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution."

This power of exclusion by the States may not be exercised by the States with reference to articles as a class, unless as an entire class, they are intrinsically unfit for commerce and not merchantable. In all other cases their unfitness for commerce must be determined by inspection and upon reasonable grounds. In the Bowman case the court say: "It has never been regarded within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse."

In no case may the States exclude from their borders or interfere with the importation of such articles as have directly or impliedly been recognized by Congress as legitimate articles of interstate commerce. And, furthermore, it is an established principle that as to articles legitimately the subjects of commerce, the silence of Congress as to them is to be construed as equivalent to a declaration that interstate trade as to them is to be unrestricted.[5]

These principles have been excellently illustrated with reference to state liquor and oleomargarine laws.

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[5] Leisy v. Hardin, 135 U. S. 100; 10 Sup. Ct. Rep. 681; 34 L. ed. 128.

§ 318. Liquor Legislation.

In Mugler v. Kansas[6] certain liquor laws of the State were held not to violate the due process clause of the Fourteenth Amendment.

In the License Cases[7] the constitutionality of the liquor laws of a number of the States was considered both with reference to the Fourteenth Amendment and the commerce clause, and, upon the whole, a considerable power on the part of the States to regulate the sale of imported liquors, recognized.

But in Bowman v. Railroad[8] the court explained that it had not in the License Cases passed squarely upon the application of state laws to liquors brought into the States from outside, and, in the case at bar, held invalid, as a regulation of interstate commerce, a law which forbade any common carrier to bring intoxicating liquors within the State from any other State or Territory, without first obtaining a certificate from the proper state officials that the consignees were licensed by the State to sell such liquors.

The argument of the court is that the statute in question was neither an inspection law, nor a police measure confining its direct operation to domestic goods, or to imported goods after they had become commingled with, and therefore a part of, the general goods of the State.

"It is not an exercise of the jurisdiction of the State over persons and property within its limits. On the contrary, it is an attempt to exert that jurisdiction over persons and property within the limits of other States. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the merchandise is brought to its border. It is not one of those local regulations designed to aid and facilitate commerce; it is not an inspection law to secure the due quality and measure of a commodity; it is not a law to regulate or restrict the sale of an article deemed injurious to the health and morals of the community; it is not a regulation confined to the purely internal and domestic commerce of the State;

[6] 123 U. S. 623; 8 Sup. Ct. Rep. 273; 31 L. ed. 205.

[7] 5 How. 504; 12 L. ed. 256.

[8] 125 U. S. 465; 8 Sup. Ct. Rep. 689; 31 L. ed. 700.

it is not a restriction which only operates upon property after it has become mingled with and forms part of the mass of the property within the State. It is, on the other hand, a regulation directly affecting interstate commerce in an essential and vital point. If authorized, in the present instance, upon the grounds and motives of the policy which have dictated it, the same would justify any and every other state regulation of interstate commerce upon any grounds and reasons which might prompt in particular cases their adoption. It is, therefore, a regulation of that character which constitutes an unauthorized interference with the power given to Congress over the subject. If not in contravention of any positive legislation by Congress, it is nevertheless a breach and interruption of that liberty of trade which Congress ordains as the national policy, by willing that it shall be free from restrictive regulations." . . .

". . . It may be said, however, that the right of the State to restrict or prohibit sale of intoxicating liquor within its limits, conceded to exist as a part of its police power implies the right to prohibit its importation, because the latter is necessary to the effectual exercise of the former. The argument is that a prohibition of the sale cannot be made effective, except by preventing the introduction of the subject of the sale; that if its entrance into the State is permitted, the traffic in it cannot be suppressed. But the right to prohibit sales, so far as conceded to the States, arises only after the act of transportation has terminated, because the sale which the State may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it."

§ 319. The Wilson Act.

The position taken by the Supreme Court in the Bowman and succeeding cases very seriously crippled the powers of the States to control the sale of intoxicating liquors within their borders. That their efficiency in this respect might be, at least partially, restored to them, Congress, in 1890, passed the so-called Wilson Act,[9] which act, still in force, provides: "That all fermented,

[9] 26 Stat. at L. 313.

distilled or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police power to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." The constitutionality, if not the desirability, of such a measure as this had been suggested by the court by Justice Matthews in the opinion in the Bowman case in which he had said: "So far as these regulations made by Congress extend, they are certainly indications of its intention that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, or by the States in particular cases by the express permission of Congress." And in Leisy v. Hardin, Chief Justice Fuller had said: "Hence inasmuch as interstate commerce . . . is national in its character and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States to do so, it thereby indicates its will that such commerce shall be free and untrammeled."

In *Re* Rahrer[10] the Wilson Act was held constitutional, but not, as had been suggested by Justices Matthews and Fuller, as a delegation by Congress to the States of a power to regulate interstate commerce to the extent provided. This, the court held, Congress might not do, the principle *delegatus non potest delegare* governing. The law might, however, it was declared, be construed as an express negation by Congress of the conclusion to be presumed from its previous silence that interstate commerce, to the extent covered by the Wilson Act, should be free from state interference or control.[11]

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[10] 140 U. S. 545; 11 Sup. Ct. Rep. 865; 35 L. ed. 572.

[11] "It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State. This being so, it is urged that the act of Congress cannot be sustained as a regulation of commerce, because the Constitution, in the matter of interstate commerce, operates *ex proprio vigore*

In short, it was held that the state liquor prohibition laws, in their application to interstate commerce, previously declared void, had been so declared not because of the inherent constitutional incompetence on the part of the States to enact them, but because Congress, by its silence, had declared that interstate commerce as to intoxicating liquors should be free from state interference.

The reasoning employed by the court in the Rahrer case has been severely criticized as casuistical, but no disposition has been since exhibited by the court to repudiate it.

§ 320. Construction of the Wilson Act.

The Wilson Act permits the State to control the sale of imported intoxicating liquors only when such control is exercised as a police measure.

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as a restraint upon the power of Congress to so regulate it as to bring any of its subjects within the grasp of the police power of the State. In other words, it is earnestly contended that the Constitution guarantees freedom of commerce among the States in all things, and that not only may intoxicating liquors be imported from one State into another, without being subject to regulation under the laws of the latter, but that Congress is powerless to obviate that result. Thus the grant to the General Government of a power designed to prevent embarrassing restrictions upon interstate commerce by any State would be made to forbid any restraint whatever. We do not concur in this view. In surrendering their own power over external commerce the States did not secure absolute freedom in such commerce, but only the protection from encroachment, afforded by confiding its regulation exclusively to Congress. By the adoption of the Constitution the ability of the several States to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the General Government substituted. . . . But this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In so doing Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt state laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property. . . . Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

In Scott v. Donald[12] the court held that the South Carolina Dispensary law did not come within the permission of the Act, because, while not forbidding the manufacture, sale, or use of intoxicating liquors, it yet attempted to restrain the introduction of such liquors into the State from other States and Territories. This, the court declared, could not properly be described as a police measure.[13]

Nor, said the court, could the measure be upheld as an inspection law; for "the prohibition of the importation of wines and liquors of other States by citizens of South Carolina for their own use is made absolute and does not depend on the purity or impurity of the articles."

In Rhodes v. Iowa[14] it was held that the terms of the Wilson Act subjecting articles of interstate commerce to state police authority "upon arrival" in such State meant, not upon crossing the state lines, but upon the consummation of their shipment, that is, delivery to the parties to whom consigned. In this case it was, therefore, held that the moving of certain consignments of liquor from the platform of the railway station to the freight warehouse, was a part of interstate commerce transportation and done before the state law could constitutionally attach to the goods thus moved.

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[12] 165 U. S. 58; 17 Sup. Ct. Rep. 265; 41 L. ed. 632.

[13] "It is not a law purporting to forbid the importation, manufacture, sale or use of intoxicating liquors as articles detrimental to the welfare of the State and to the health of the inhabitants, and hence it is not within the scope and operation of the act of Congress of August, 1890. That law was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce. . . . The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law must forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors to be valid. But the State cannot, under the congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."

[14] 170 U. S. 412; 18 Sup. Ct. Rep. 664; 42 L. ed. 1088.

In Scott v. Donald the court had said that the Dispensary law "is not a law purporting to forbid the importation, manufacture, sale, and use of intoxicating liquor, as detrimental to the welfare of the State and to the health of the inhabitants, and hence it is not within the scope of the operation of the Wilson Act." This had generally been understood as intimating that only state laws totally prohibiting the manufacture and sale of intoxicating liquors within the State would be held to come within the provisions of the Wilson Act. In Vance v. Vandercook,[15] however, the court held that because a state law permits the sale of liquors subject to particular restrictions it does not follow that the law is not a police measure and, therefore, beyond the permissive provisions of the Wilson Act. Also it was held that the state law was not discriminative against interstate commerce because it gave to state authorities an exclusive right to purchase all liquor sold in the State, which right they might employ to purchase from whomsoever they might please.

The state law was, however, held invalid in so far as it attempted to prevent the residents of the State from importing liquors for their own use, the permission of the Wilson law being held to extend only to the prohibition of the sale in original packages of importations of intoxicating liquors. And, in fact, it is declared that Congress could not constitutionally give to the States this power to prohibit importation of goods for the importer's own use, because, as the opinion declares, this right "is derived from the Constitution of the United States and does not rest on the grant of the state law."[16]

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[15] 170 U. S. 438; 18 Sup. Ct. Rep. 674; 42 L. ed. 1100.

[16] Commenting upon this last statement, Justice Shiras, Chief Justice Fuller, and Justice McKenna declare that, once concede that Congress may authorize the States to forbid the sale of original packages, it would, by a parity of reasoning, follow that Congress might permit the States to forbid importation for use. As a matter of fact, however, these justices denied that Congress could do either and asserted that the permission of the Wilson Act was intended to apply only to those cases in which the States, as a police measure, should find it necessary to declare that the use of intoxicating liquors of any kind is against morality, good health and the safety of the community, and wholly to prohibit their manufacture and sale.

The court having decided that a State could not, even when aided by the provisions of the Wilson Act, prevent its inhabitants from importing liquors for their own use and consumption, the question soon arose whether this principle would, notwithstanding state prohibition laws, validate C. O. D. shipments of liquors, that is, express consignments of liquors which were to be paid for on delivery. It was argued that as to these the nature of the contract fixed the place of sale at the residence of the consignees and made the express company the agent of the consignors, and that the sale of liquor being within the control of the State, the express company thereby became liable to the penalties of the state prohibition laws.

In Adams Express Co. v. Iowa,[17] however, the court declared the question as to when title to the liquors passed to be irrelevant, the material point being whether, in point of fact, interstate commerce could be said to be interfered with. This they declared would result from an attempt on the part of the States to restrain or punish the delivery of such C. O. D. shipments. After observing that there was a diversity of opinion as to when title to C. O. D. shipments passes, the court say: "But we need not consider this subject. Beyond possible question, the contract to sell and ship was completed in Illinois. The right of the parties to make a contract in Illinois for the sale and purchase of merchandise, and, in doing so, to fix by agreement the time when and condition on which the completed title should pass, is beyond question. The shipment from the State of Illinois into the State of Iowa of the merchandise constituted interstate commerce. To sustain, therefore, the ruling of the court below would require us to decide that the law of Iowa operated in another State so as to invalidate a lawful contract as to interstate commerce made in such other State; and, indeed, would require us to go yet further, and say that, although, under the interstate commerce clause, a citizen in one State had a right to have merchandise consigned from another State delivered to him in the State to which the shipment was made, yet that such right was so illusory that it only obtained in

[17] 196 U. S. 147; 25 Sup. Ct. Rep. 185; 49 L. ed. 424.

cases where, in a legal sense, the merchandise contracted for had been delivered to the consignee at the time and place of shipment.[18]

In Pabst Brewing Co. v. Crenshaw[19] it was held that, under the operation of the Wilson Act, a state inspection law was valid which provided for an inspection of beer and other malt liquors shipped into the State and held there for sale or consumption. The fact that an inspection fee was charged which was greater than the cost of the inspection itself, and that this inspection which was provided was inadequate as a protection against fraud or impurity, was held immaterial.[20]

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[18] "When it is considered," the opinion continues, "that the necessary result of the ruling below was to hold that, wherever merchandise shipped from one State to another is not completely delivered to the buyer at the point of shipment so as to be at his risk from that moment, the movement of such merchandise is not interstate commerce, it becomes apparent that the principle, if sustained, would operate materially to cripple, if not destroy, that freedom of commerce between the States which it was the great purpose of the Constitution to promote. If upheld, the doctrine would deprive a citizen of one State of his right to order merchandise from another State at the risk of the seller as to delivery. It would prevent the citizen of one State from shipping into another unless he assumed the risk; it would subject contracts made by common carriers, and valid by the laws of the State where made, to the laws of another State; and it would remove from the protection of the interstate commerce clause all goods on consignment upon any condition as to delivery, express or implied. Besides, it would also render the Commerce Clause of the Constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of interstate commerce by means of bills of lading to the shipper's order, with drafts for the purchase price attached, and many other transactions essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof."

The opinion further declares that the point involved had, in fact, been substantially decided in Caldwell v. North Carolina, 187 U. S. 622; 23 Sup. Ct. Rep. 229; 47 L. ed. 336, and Norfolk, etc., R. Co. v. Sims, 191 U. S. 441; 24 Sup. Ct. Rep. 151; 48 L. ed. 254. See a discussion of these cases *post*, p. 706.

[19] 198 U. S. 17; 25 Sup. Ct. Rep. 552; 49 L. ed. 925.

[20] The court say: "Conceding that the law in question may be inadequate to accomplish the purpose designed, and produces a large revenue to the State over and above the cost of inspection, this affords no federal ground upon which to hold that the police power of the State would not be brought into play in making the enactment where the law does not operate upon a subject within the federal control. This becomes evident when it is borne in mind that, whether the statute be regarded as a prohibition, as a regulation,

Furthermore the court held immaterial the fact that the operation of the state law was or might be such as to deter importations into the State. As to this the majority justices say: "If, when a State has but exerted the power lawfully conferred upon it by the act of Congress, its action becomes void as an interference with interstate commerce because of the reflex or indirect influence arising from the exercise of the lawful authority, the result would be that a State might exert its power to control or regulate liquor; yet if it did so its action would amount to a regulation of commerce and be void. And this would be but to say at one and the same time that the power could and could not be exercised. But the proposition would have a much more serious result, since to uphold it would overthrow the distinction between direct and indirect burdens upon interstate commerce, by means of which the harmonious workings of our constitutional system has been made possible." [21]

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as a license, or as an inspection law, if it encroached upon the federal authority it would be void, and, on the contrary, in all or any of these aspects the law would be valid, so far as the federal Constitution is concerned, if it did not so encroach. The purpose of the Wilson Act was to make liquor after its arrival a domestic product, and to confer power upon the States to deal with it accordingly. The police power is, hence, to be measured by the right of a State to control or regulate domestic products, a state, and not a federal question as respects the Commerce Clause of the Constitution. So far as the state aspect is concerned, the matter is foreclosed by a decision of the supreme court of Missouri passing upon the validity, under the state Constitution of the law now under consideration."

[21] In a strong dissenting opinion three justices agree that the law in question should have been held void. They deny that the law could rightly be sustained as an inspection law, for it did not provide for an adequate inspection, or that it was a legitimate police measure, for it did not afford protection against fraud or impurity; and finally, they emphasize the fact that the inspection fee charged was excessive, being thirty times the cost of inspection. "A disproportion so gross," they say, "can only be accounted for upon the theory that the act was intended for the purposes of revenue and not for inspection." As to the application of the Wilson Act the dissenting justices say: "The act does not affect the right of inspection, since the right was one which existed wholly independent of the act, and had been applied and recognized ever since the case of New York v. Miln (11 Pet. 102; 9 L. ed. 648), as one of the ordinary police powers of the State, which it was at liberty to exercise quite irrespective of any federal statute for the protection of the health of its citizens. The Wilson Act neither creates, adds to, takes from, nor affects, the police powers of the State with respect to inspection in any

In Heymann v. Southern R. Co.[22] it was held that the delivery of the interstate shipment of intoxicating liquors to their consignees

particular. The power of the State to enact inspection laws, provided that such laws are intended in good faith for the protection of the people, and not as a covert means for raising revenue by exorbitant charges, remains precisely as it was before the act was passed. . . . While we may concede that the liquors in this case had arrived at their destination, it does not follow that they were subject to any law which the State chose to pass in an assumed exercise of the police power. The State has an undoubted right to inspect all goods arriving therein, but it does not follow that it has the right to subject them to an inspection which is no inspection at all, and charge them with a fee out of all proportion to the costs of even a proper inspection, and to call it an exercise of the police power. Though these liquors had arrived at their destination, the State provided that, by § 5 of the act, they should be inspected before offering them for sale and before they had been commingled with the general mass of property. The fact that they had been delivered to the consignee was of no materiality, since the act which the State required should be done was one which applied a condition precedent to their admission to the State for commercial purposes. Until this act was performed, they were protected against an unlawful interference. This inspection might have taken place at the state line, but, for the convenience of the state officers, as well as that of the brewers, it was postponed until the arrival at their destination, as is frequently the case in foreign countries, where imported goods are not examined at the frontier, but at Paris or London, upon their arrival there; but they are not legally entered until such examination takes place. To say that their character as interstate commerce existed at the state line, but had been lost upon their arrival at their place of destination before they had shown themselves entitled to enter the State, is to apply a test wholly irrelevant under the circumstances. . . . If the inspection were not a *bona fide* exercise of the police power, it was an unlawful interference with such commerce. Whether the inspection was made at the state line, or at the destination of the goods, it absolutely immaterial. . . . The consequences of this decision seem to me extremely serious. If the States may, in the assumed exercise of police powers, enact inspection laws, which are not such in fact, and thereby indirectly impose a revenue tax on liquors, it is difficult to see any limit to this power of taxation, or why it may not be applied to any other articles brought within the State, and the cases of Minnesota v. Barber, 136 U. S. 313; 10 Sup. Ct. Rep. 862; 34 L. ed. 455, and Brimmer v. Rebman, 138 U. S. 78; 11 Sup. Ct. Rep. 213; 34 L. ed. 862, be practically overruled. The Wilson Act does not give the legislature any greater authority with respect to the inspection of liquors, and, as already observed, it leaves the question of inspection where it found it. If the Wilson Act receives its natural application — that is, of meeting the exigency created by our decision in Leisy v. Hardin, and enabling the States to enforce their prohibitory liquor laws upon the arrival of the liquor within the State, as we have repeatedly held.— the law has a definite and distinct value, and is readily understood."

[22] 203 U. S. 270; 27 Sup. Ct. Rep. 104; 51 L. ed. 178.

is essential to constitute their "arrival" within the meaning of the Wilson Act, and also that the mere placing of such a shipment in the carrier's warehouse to await delivery to the consignee does not constitute arrival.[23]

In Delamater v. South Dakota[24] the application of the doctrine declared in Vance v. Vandercook is limited in its application to orders for liquor placed by the individual consumer, and the authority of the States upheld to impose an annual license charge upon the business of selling or offering for sale within the State by traveling salesmen intoxicating liquors in quantities less than five gallons which are to be brought into the State from outside. In this case it was strenuously argued that inasmuch as the liquor thus sold had not arrived and been delivered in the State, it could not be held to come within the terms of the Wilson Act. As to this the court say: "This is simply to misapprehend and misapply the cases and to misconceive the nature of the act done in the carrying on the business of soliciting proposals. The rulings in the previous cases to the effect that, under the Wilson Act, state

[23] The court say: "As the general principle is that goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package, and as the settled rule is that the Wilson law was not an abdication of the power of Congress to regulate interstate commerce, since that law simply affects an incident of such commerce, by allowing the state power to attach after delivery and before sale, we are not concerned with whether, under the law of any particular State, the liability of a railroad company as carrier ceases and becomes that of a warehouseman on the goods reaching their ultimate destination before notice and before the expiration of a reasonable time for the consignee to receive the goods from the carrier. For, whatever may be the divergent legal rules in the several States concerning the precise time when the liability of a carrier as such in respect to the carriage of goods ends, they cannot affect the general principle as to when an interstate shipment ceases to be under the protection of the Commerce Clause of the Constitution." The court, however, add that they do not decide "if the goods of the character referred to in the Wilson Act moving in interstate commerce, arrive at the point of destination, and, after notice and full opportunity to receive them, are designedly left in the hands of the carrier for an unreasonable time, that such conduct on the part of the consignee might not justify, if affirmatively alleged and proven, the holding that goods so dealt with have come under the operation of the Wilson Act, because constructively delivered."

[24] 205 U. S. 93; 27 Sup. Ct. Rep. 447; 51 L. ed. 724.

authority did not extend over liquor shipped from one State to another until arrival and delivery to the consignee at the point of destination, were but a recognition of the fact that Congress did not intend, in adopting the Wilson Act, even if it lawfully could have done so, to authorize one State to exert its authority in another State by preventing the delivery of liquor embraced by transactions made in such other State. The proposition here relied on is widely different, since it is that, despite the Wilson Act, the State of South Dakota was without power to regulate or control the business carried on in South Dakota of soliciting proposals relating to liquor situated in another State. But the business of soliciting proposals in South Dakota was one which that State had a right to regulate, wholly irrespective of when or where it was contemplated the proposals would be accepted or whence the liquor which they embraced was to be shipped. Of course, if the owner of the liquor in another State had the right to ship the same into South Dakota as an article of interstate commerce, and, as such, there sell the same in the original package, irrespective of the laws of South Dakota, it would follow that the right to carry on the business of soliciting in South Dakota was an incident to the right to ship and sell, which could not be burdened without directly affecting interstate commerce. But as by the Wilson Act the power of South Dakota attached to intoxicating liquors when shipped into that State from another State after delivery but before the sale in the original package, so as to authorize South Dakota to regulate or forbid such sale, it follows that the regulation by South Dakota of the business carried on within its borders of soliciting proposals to purchase intoxicating liquors, even though such liquors were situated in other States, cannot be held to be repugnant to the Commerce Clause of the Constitution, because directly or indirectly burdening the right to sell in South Dakota, a right which by virtue of the Wilson Act did not exist."

It was also argued in this case that it having been decided in Vance v. Vandercook that, notwithstanding the Wilson Act, the State had no right to prohibit the importation of liquor by a resident for his own use and consumption, it, therefore, followed that

the State might place no burden upon the solicitation of orders of liquors for such purpose. To this, however, the court replied, that between the right of the individual to import goods from another State or to make a contract for such importation, and the right of a person or company to carry on the business of soliciting such contracts there is a wide difference; and that previous decisions of the court had established that while the power could not be interfered with or restrained by the States, the latter could be. Thus it had been held that a State might regulate and forbid the making within its borders of insurance contracts with its citizens by foreign insurance companies or their agents;[25] but that the States might not prohibit a citizen from making a contract of insurance in another State.[26]

In Adams Express Co. v. Kentucky[27] it was held that the agreement of the local agent of the express company to hold for a few days a C. O. D. interstate shipment of liquor to suit the convenience of the consignee did not destroy the character of the transaction as interstate commerce and render the company liable to prosecution under a state liquor law. Also, it was held that evi-

[25] Hooper v. California, 155 U. S. 648; 15 Sup. Ct. Rep. 207; 39 L. ed. 297.

[26] Allgeyer v. Louisiana, 165 U. S. 578; 17 Sup. Ct. Rep. 427; 41 L. ed. 832; Nutting v. Massachusetts, 183 U. S. 553; 22 Sup. Ct. Rep. 238; 46 L. ed. 324.

After quoting from Nutting v. Massachusetts, the court say: "The ruling thus made is particularly pertinent to the subject of intoxicating liquors and the powers of the State in respect thereto. As we have seen, the right of the States to prohibit the sale of liquor within their respective jurisdictions in and by virtue of the regulation of commerce embodied in the Wilson Act is applicable to liquor shipped from one State into another, after delivery, and before the sale in the original package. It follows that the authority of the States, so far as the sale of intoxicating liquors within their borders is concerned, is just as complete as is their right to regulate within their jurisdiction the making of contracts of insurance. It hence must be that the authority of the States to forbid agents of non-resident liquor dealers from coming within their borders to solicit contracts for the purchase of intoxicating liquors which otherwise the citizen of the State 'would not have thought of making' must be as complete and efficacious as is such authority in relation to contracts of insurance, especially in view of the conceptions of public order and social well-being which it may be assumed lie at the foundation of regulations concerning the traffic in liquor."

[27] 206 U. S. 129; 27 Sup. Ct. Rep. 606; 51 L. ed. 987.

dence that the express company knew that the C. O. D. shipment of liquor had not been ordered by the consignee was immaterial on a criminal prosecution where the indictment averred that the company was engaged in the business of a common carrier, and shipment and delivery were made in the usual course of its business.

§ 321. Proposed Legislation.

Numerous measures have been proposed in Congress the aim of which has been to empower the States to exercise full jurisdiction over interstate shipments of intoxicating liquors, immediately upon their coming within their borders, whether before or after delivery, and whether imported for sale or consumption by the individual consignees. The constitutionality of such a delegation of authority by Congress to the States would seem to be open to serious question, at least so long as the States have not prohibited the use but only the manufacture and sale of intoxicating liquors. Thus, for example, it is argued that the Wilson law but removed an impediment to the exercise of their police powers by the States, that impediment being the incidental right which the importer has to sell the commodities imported; whereas the proposed legislation would delegate to the States a direct authority over interstate shipments of liquors. As Senator Knox declares: "The state power over liquor in the hands of consignees who imported them was unshackled by the Wilson Act, which was a regulation of commerce, removing the impediment to the complete exercise of state power: the impediment being the incidental right to sell. The effect of the removal of this impediment was not to permit the State to invade the federal domain by acts which in their nature and essence are acts regulating commerce, such as by seizing goods in transit, but to enable the States to freely exercise their proper powers to regulate their own internal affairs, after the interstate contract had been completed by a delivery of the goods to the consignee and after title had passed. To remove a barrier which prevented States from acting freely in their own domain is quite another matter from removing a barrier that will let them in on the federal domain." [28]

[28] Sen. Rep. 499, 60th Cong., 1st Sess.

Upon the other hand it has been argued that, conceding the constitutionality of the Wilson law, the validity of the proposed legislation is established; that under the Wilson law Congress relinquished a portion of its control over interstate commerce, and, under the proposed legislation, would relinquish an additional portion.

§ 322. Oleomargarine Cases.

In Powell v. Pennsylvania[29] the court held that a state law which, as a police regulation, laid down certain rules for the manufacture and sale of oleomargarine, was not, as alleged, a violation of the due process of law provision of the Fourteenth Amendment.

In Plumley v. Massachusetts[30] the court again upheld a drastic state law regulating the manufacture and sale of articles simulating butter, as being in violation neither of the Fourteenth Amendment, nor of the Commerce Clause, even when applied to such articles brought from other States. The validity of the law was sustained as a legitimate police provision against fraud, the court as to this saying: "It will be observed that the statute of Massachusetts . . . does not prohibit the manufacture or sale of all oleomargarine, but only such as is colored in imitation of yellow butter produced from pure unadulterated milk or cream of such milk. . . . The statute seeks to suppress false pretences and to promote fair dealing in the sale of an article of food. . . . Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand recognition of the right to practise a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?"[31]

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[29] 127 U. S. 678; 8 Sup. Ct. Rep. 992; 32 L. ed. 253.

[30] 155 U. S. 461; 15 Sup. Ct. Rep. 154; 39 L. ed. 223.

[31] The case is distinguished from the liquor cases on the ground that in those cases no element of fraud was involved. But as Prentice and Egan

In Collins v. New Hampshire[32] it was held that a State cannot render an article of interstate commerce unsalable, as for example compelling artificial butter to be colored pink, any more than it can prevent its importation.

In Schollenberger v. Pennsylvania,[33] however, the court when asked to enforce a state oleomargarine law with reference to the importation and sale in the original package of oleomargarine manufactured in another State, held the law void so far as its application to interstate and foreign commerce was concerned. Oleomargarine, the court held, had been recognized by the Federal Government as a proper subject of interstate commerce, and it was, therefore, beyond the competence of the States whether in the exercise of their police or other powers, to place restrictions upon its importation or exportation. The court, after a review of earlier cases, say: "The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a State from another State where it was manufactured or grown. A State has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion of an article of food."

§ 323. The States and Foreign Corporations Doing an Interstate Commerce Business.

The right to engage in interstate commerce it has often been declared is a federal right, and is, therefore, independent of state control. In Vance v. Vandercook,[34] as has already been referred to, the right of the individual to import was declared to be "derived from the Constitution of the United States, and does not rest on the grant of the state law."

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properly remark, the protection of health and morals is as much within the scope of the police powers as is protection against fraud, and "the consequences of buying, even through error, a palatable and nutritious substitute for butter, instead of the genuine article, are not worse than the consequences of disease and crime which result from the general use of intoxicating liquors." *The Commerce Clause*, p. 51.

[32] 171 U. S. 30; 18 Sup. Ct. Rep. 768; 43 L. ed. 60.

[33] 171 U. S. 1; 18 Sup. Ct. Rep. 757; 43 L. ed. 49.

[34] 170 U. S. 438; 18 Sup. Ct. Rep. 674; 42 L. ed. 1100.

Nor, as we have also learned, can a State render illegal or in any way restrain the making of contracts by its residents with reference to interstate commerce.[35]

So, likewise, it is established that a State, though it may prevent, or attach such conditions as it sees fit to the entrance of a foreign corporation within its borders for the purpose of doing business generally within the State, may not prevent or restrain that corporation, any more than it may prevent or restrain an individual, from engaging in interstate commerce within its borders.

That a corporation is not considered a "citizen" within the meaning of the provision of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States, has not been questioned since Paul v. Virginia.[36] The privileges and immunities referred to in that clause are those which are common to the citizens under their Constitution and laws by virtue of their being citizens, and are not those special privileges which may be granted them and which are valid only within the State creating them. "A grant of corporate existence," the court say, "is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created."

But though not a citizen within the interstate comity clause, the corporation is a person within the "due process clauses" of the Constitution and possesses all the other federal privileges and immunities, which can attach to an artificial person, and among these is the right to engage in interstate commerce. "If," say the court in Crutcher v. Kentucky,[37] "a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other States, it would not be within the

[35] Delamater v. South Dakota, 205 U. S. 93; 27 Sup. Ct. Rep. 447; 51 L. ed. 724.

[36] 8 Wall. 168; 19 L. ed. 357.

[37] 141 U. S. 47; 11 Sup. Ct. Rep. 851; 35 L. ed. 649.

province of the state legislature to exact conditions on which they should carry on their business, nor require them to take out a license therefor. To carry on interstate commerce is not a franchise or privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States, and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject." [38]

In Pensacola Telegraph Co. v. Western Union Telegraph Co.[39] it is established that a company chartered by the United States to do an interstate commerce business cannot be prevented by a State from carrying on that business within its borders. With reference to the case of Paul v. Virginia the court observed that the corporation there involved was not engaged in interstate commerce and "enough was said by the court to show that if it had been, a very different question would have been presented." [40]

A State, though not able to exclude from its borders a federally chartered corporation engaged in interstate commerce, is not compelled to aid that corporation by granting to it any special privileges, as, for example, the right of eminent domain. Congress may, however, endow such a corporation with the right of eminent domain, which right it may exercise within the States without their consent or against their will.[41]

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[38] In these respects the court go on to say, the States have no more authority than they have over corporations chartered in foreign countries, and engaged in landing goods or passengers in American ports, or soliciting business here.

[39] 96 U. S. 1; 24 L. ed. 708.

[40] It may be said, generally, that a State cannot exclude a corporation in the employ of, or performing services for the Federal Government. Pembina Co. v. Penn, 125 U. S. 181; 8 Sup. Ct. Rep. 737; 31 L. ed. 650; Postal Tel. Co. v. Adams, 155 U. S. 688; 15 Sup. Ct. Rep. 268; 39 L. ed. 311.

[41] This right may not, however, be exercised with reference to land owned or already devoted to a public use by the State. Chapter XXVI.

§ 324. Foreign Corporations "Doing Business" Within the States.

Though, as we have seen, a State may not prevent foreign corporations from carrying on interstate commerce business within its borders, it may prevent them from doing business generally as a corporation within the State; or it may attach such conditions as it sees fit to the doing of such business, other than interstate commerce, as a corporation. But permission to continue to do an interstate business may not be founded upon conditions which, in effect, interfere with interstate business.[42]

In Paul v. Virginia[43] the court say: "Having no absolute right of recognition in the States, but depending for such recognition and enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests on their discretion." [44]

In Western Union Telegraph Co. v. Kansas,[45] however, the exactions that may be made by a State of a foreign corporation doing an interstate commerce business as a condition for doing a domestic business within the State are carefully considered and prior adjudications examined, and, by a divided court, the doctrine declared that a charter fee of a certain per cent. of the entire capital stock might not be exacted of a foreign telegraph company as a condition to being permitted to continue to do an intrastate business within the State. This exaction the majority of the court declared to be in essence a burden and tax on the company's inter-

[42] Whether or not the refusal of the privilege, or the withdrawal of a consent once given may be predicated upon an agreement of the corporation not to exercise a federal right, as, for example, to resort to the federal courts, see Section 74.

[43] 8 Wall. 168; 19 L. ed. 357.

[44] Quoted with approval in Waters Pierce Oil Co. v. Texas, 177 U. S. 28; 20 Sup. Ct. Rep. 518; 44 L. ed. 657.

[45] 216 U. S. 1; 30 Sup. Ct. Rep. 190.

state business and on its property located and used outside of the State. The fact that there is difficulty in harmonizing this decision with that of Security Mutual Ins. Co. v. Prewitt[46] is elsewhere adverted to.[47]

§ 325. What Constitutes "Doing Business" in the State.

It is often a very difficult matter to determine when a foreign corporation may be said to be "doing business" within the State, as a corporation, or simply engaged in individual interstate commercial transactions in the State.

The courts have not been able to lay down any general rule for determining this question, but have been compelled to decide each case upon its own merits or facts. The more important of these specific adjudications will be discussed in the next sections, in which will be considered the taxing powers of the States with reference to interstate commerce.

§ 326. State Taxation and Interstate and Foreign Commerce.

It has already been shown that the States are permitted, in the exercise of the powers reserved to them, substantially to affect interstate and foreign commerce, so long as this interference is an indirect, incidental one, the legislation in question a legitimate and *bona fide* exercise of a reserved power, and not in contravention to any existing federal statute or regulation. This principle holds true with reference to the taxing powers of the States. A direct taxation of interstate or foreign commerce, that is of the goods carried as exports or imports, of the agencies and instrumentalities of such commerce as such, or of the act of carrying on, or the right to engage in or to carry on, interstate and foreign commerce, is always construed as a regulation of such commerce, and, as such, beyond the power of the States.

A State cannot even enforce the collection of a valid tax by an injunction restraining a person or corporation from doing interstate commercial business.[48]

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[46] 202 U. S. 246; 26 Sup. Ct. Rep. 619; 50 L. ed. 1013.

[47] Section 74.

[48] Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530; 8 Sup. Ct. Rep. 961; 31 L. ed. 790.

In Osborne v. Mobile[49] the court sustained a state tax which bore directly upon interstate commerce companies as such. The law in question in this case required every express or railroad company doing business in the city of Mobile and having a business extending beyond the limits of the State to pay a certain annual license fee. The court sustained the provision on the ground that there was no discrimination between the citizens of the State and the citizens of other States.

In Moran v. New Orleans[50] this position was practically departed from, and in Leloup v. Mobile[51] the doctrine absolutely and explicitly repudiated that any state tax however undiscriminative, or whatever its other features, can be valid which imposes a burden upon persons or corporations engaged in interstate commerce, because of their being so engaged. The doctrine is in this case squarely laid down that no tax may be levied by a State which is imposed upon interstate commerce as such or operates as a direct burden thereupon. The court, after a review of authorities, say: "No State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and demands a regulation of it, which belongs solely to Congress."

This doctrine, as thus stated, has now for many years been so well established that States no longer attempt to tax interstate commerce directly. Many state tax laws, however, though not expressly made applicable to interstate commerce transactions, have so substantially burdened commerce among the States as to raise the question whether they are not thus brought within the operation of the prohibition. It will be necessary, therefore, to consider the special cases in which the constitutionality of state tax laws have been tested by the Commerce Clause.

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[49] 16 Wall. 479; 21 L. ed. 470

[50] 112 U. S. 69; 5 Sup. Ct. Rep. 38; 28 L. ed. 653.

[51] 127 U. S. 640; 8 Sup. Ct. Rep. 1383; 32 L. ed. 311.

§ 327. License Taxes.

A license tax on an importer, or on the business of importing goods from another State, is a taxation of, and therefore an unconstitutional regulation of interstate commerce. This was early determined in the case of Brown v. Maryland.[52] This principle was somewhat disturbed in the License Cases,[53] but was later fully reestablished.

In Leloup v. Mobile[54] the court declared invalid a general license tax on a telegraph company, on the ground that it affected its entire business, interstate as well as domestic. "The tax affects the whole business without discrimination," the court declared. "There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

Where, however, a company is doing both interstate and intrastate commerce business, a license tax may be levied upon the latter if it be separable from the former and if the company be left free, should it desire to do so, to give up its domestic business and continue undisturbed its interstate transactions.

In Pullman Co. v. Adams[55] the court say: "If the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the State, the case is governed by Osborne v. Florida, 164 U. S. 650, 17 Sup. Ct. Rep. 214; 41 L. ed. 586. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce."[56]

It must clearly appear, however, that the license tax is exclusively upon the local business, and that its payment is not a

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[52] 12 Wh 419; 6 L. ed. 678.

[53] 5 How. 504; 12 L. ed. 256.

[54] 127 U. S. 640; 8 Sup. Ct. Rep. 1383; 32 L. ed. 311.

[55] 189 U. S. 420; 23 Sup. Ct. Rep. 494; 47 L. ed. 477.

[56] But see, in modification of this, Pullman Co. v. Kansas, 216 U. S. 54; 30 Sup. Ct. Rep. 232.

condition precedent to the transaction of interstate business. And, furthermore, if the tax, whatever its name, amounts to more than an ordinary tax upon the property of the company doing both an interstate and domestic business, it will be held void. In Postal Telegraph Cable Co. v. Adams[57] the court say: "Property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment."

The exaction by a city of a tax on the poles of a telegraph company, doing an interstate commerce business, has been held to be not a license tax on the interstate commerce, but a rental for the use by the company of the city streets.[58] Such a tax, however, the court point out, may not be unreasonable in amount.[59]

§ 328. Taxation of Foreign Corporations.

The property of foreign corporations may be taxed as such by the State in which the property is situated. It may indeed be subjected to a heavier tax than other like property in the State, if the State see fit to attach this as a condition to the permission granted

[57] 155 U. S. 688; 15 Sup. Ct. Rep. 268; 39 L. ed. 311.

[58] St. Louis v. Western Union Tel. Co., 148 U. S. 92; 13 Sup. Ct. Rep. 485; 37 L. ed. 380.

[59] *Cf.* W. U. Tel. Co. v. Borough of New Hope (187 U. S. 419; 23 Sup. Ct. Rep. 204; 47 L. ed. 240), in which it was held that an ordinance imposing a license fee on telegraph poles was not void because it yielded a return in excess of amount necessary to meet the cost of supervision and inspection.

to the corporation to do business within the State. In such case, however, the tax is not in reality a property, but a license tax. Ordinarily, however, taxes, other than the ordinary property taxes, imposed on foreign corporations are explicitly in the nature of license taxes. Such license taxes may, however, be imposed only in case the corporations may fairly be said to be "doing business" within the State. This is a fact which the courts, when appealed to, must determine in each case. It may be said, generally, however, that a corporation cannot be said to be "doing business" in the State unless it has established a trade domicile of some sort, that is, established a branch office, or created a sales agency, a factory, or a distributing warehouse.

If, however, the foreign corporation be a carrier carrying on interstate commerce, as for example, a railroad, or telegraph, or telephone company, it may establish offices, or other agencies for the transaction of its business within the State, free from liability to a license tax or other burden or restraint by the State. Thus, in McCall v. California[60] a state law was held void under which it was attempted to collect a license tax upon agents soliciting passenger business for certain interstate railroads.[61]

The sending by a foreign corporation of agents through the State for the purpose of taking orders for goods, which goods are to be later shipped into the State, is an interstate commerce transaction, and does not constitute doing business in the State, so that a license tax may be imposed.[62]

§ 329. State Tax Law Must Not Discriminate Against Products of Other States, or Against Companies Doing an Interstate Commerce Business.

Tax laws, or, indeed, any other laws of a State discriminating against non-resident traders or against the products of other States are void as interfering with interstate commerce.

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[60] 136 U. S. 104; 10 Sup. Ct. Rep. 881; 34 L. ed. 391.

[61] Three justices dissented in this case upon the ground that the interference with interstate commerce was not sufficiently direct to bring it within the operation of the Commerce Clause.

[62] See *post*, Section 330.

In Ward v. Maryland[63] the court held void a state law by which persons not permanent residents in the State were prohibited from selling or offering for sale within a certain district of the State, any goods whatsoever other than agricultural products and articles manufactured in the State.

In Welton v. Missouri[64] the same doctrine was declared, the court saying: "The commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it even after it has entered the State, from any burdens imposed by reason of its foreign origin."

In Guy v. Baltimore[65] was adjudged invalid a municipal ordinance establishing certain wharfage rates to be paid by vessels carrying goods other than the productions of the State, the court, after a review of the authorities, saying: "In view of these and other decisions of this court, it must be regarded as settled that no State can, consistently with the federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory."

In Webber v. Virginia[66] a state license law was again held invalid because dependent upon the foreign character of the articles dealt with. "If," the court say, "by reason of their foreign character, the State can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several States."

[63] 12 Wall. 418; 20 L. ed. 449.
[64] 91 U S. 275; 23 L. ed. 347.
[65] 100 U. S. 434; 25 L. ed. 743.
[66] 103 U. S. 334; 26 L. ed. 565.

In Walling v. Michigan[67] was held void, because discriminative, a state law which imposed a specific tax on persons, not having their principal place of business in the State, engaged in selling liquors at wholesale, or in soliciting or taking orders for such liquors to be shipped into the State from outside the State, without imposing a similar tax upon persons engaged in the selling of liquors manufactured in the State.

In Darnell & Son Co. v. Memphis[68] the authorities are carefully reviewed, a law of Tennessee being held void which, while imposing a tax on the products of the soil of other States, exempted those produced from its own soil.

§ 330. Drummers.

The leading case establishing the doctrine that the negotiation by sales-agents of sales of goods which are in another State for the purpose of introducing them into the State where the negotiation is had, is interstate commerce and not subject to regulation or taxation by the State, is Robbins v. Taxing District of Shelby Co.[69]

In Asher v. Texas,[70] and Brennan v. Titusville[71] the same doctrine is declared.

In Ficklen v. Shelby Co.[72] the doctrine is again asserted but declared not applicable to a license tax imposed upon a citizen doing a general commission business, though he was able to show that during the year for which he resisted the payment of the tax his commissions were wholly derived from interstate business, that is, orders taken for goods to be shipped into the State. The court argued that this was an adventitious circumstance and that having taken out a license to do a general commission business, and agreed to pay a certain percentage thereon, the tax was to be construed as a general license tax and not one on interstate

[67] 116 U. S. 446; 6 Sup. Ct. Rep. 454; 29 L. ed. 691.
[68] 208 U. S. 113; 28 Sup. Ct. Rep. 247; 52 L. ed. 413.
[69] 120 U. S. 489; 7 Sup. Ct. Rep. 592; 30 L. ed. 694.
[70] 128 U. S. 129; 9 Sup. Ct. Rep. 1; 32 L. ed. 368.
[71] 153 U. S. 289; 14 Sup. Ct. Rep. 829; 38 L. ed. 719.
[72] 145 U. S. 1; 12 Sup. Ct. Rep. 810; 36 L. ed. 601.

business. In a later case, the court, however, recognized that this case was on the boundary line of the States' power.[73]

In Stockard v. Morgan[74] a privilege tax imposed by a State upon merchant brokers whose business was exclusively confined to soliciting orders from jobbers and wholesale dealers within the State, as agent for non-resident parties, for goods to be shipped into the State by such parties, was held void as laying a burden upon interstate commerce.[75]

In Caldwell v. North Carolina[76] it was contended by the State that a tax levied by it for selling pictures therein was valid because, though the contract of sale was made outside the State, the pictures and frames when sent into the State were unboxed by

[73] Brennan v. Titusville, 153 U. S. 289; 14 Sup. Ct. Rep. 829; 38 L. ed. 719.

[74] 185 U. S. 27; 22 Sup. Ct. Rep. 576; 46 L. ed. 785.

[75] After quoting from the Ficklin case, the court say: "From these extracts from the opinion it is seen that a material fact in the case was that Ficklin had taken out a general and unrestricted license to do business as a broker, and he was thereby authorized to do any and all kinds of commission business, and therefore became liable to pay the privilege tax exacted. Although Ficklin's principals happened in the year 1887 to be wholly non-residents, the fact might have been otherwise, as was stated by the Chief Justice, because his business was not confined to transactions for non-residents. In this case the complainants did not represent or assume to represent any residents of the State of Tennessee, and each of the complainants represented only certain specific parties, firms, or corporations, all of whom were non-residents of Tennessee. They did no business for a general public. We attach no importance to the fact that in the Robbins case the individual taxed resided outside of the State. He was taxed by reason of his business or occupation while within it, and the tax was held to be a tax upon interstate commerce. Nor does the fact that the complainants acted for more than one person residing outside of the State affect the question. If while so acting and soliciting orders within the State for the sale of property for one non-resident of the State, the person so soliciting was exempt from taxation on account of that business, because the tax would be upon interstate commerce, we do not see how he could become liable for such tax because he did business for more than one individual, firm, or corporation, all being non-residents of the State of Tennessee. The fact that the State or the court may call the business of an individual, when employed by more than one person outside of the State, to sell their merchandise, upon commission, a 'brokerage business,' gives no authority to the State to tax such a business as complainants'. The name does not alter the character of the transaction, nor prevent the tax thus laid from being a tax upon interstate commerce."

[76] 187 U. S. 622; 23 Sup. Ct. Rep. 229; 47 L. ed. 336.

the agent who received them, and each picture put into its frame, before delivery to the purchaser. The court, however, say: "Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate.

Transactions between manufacturing companies in one State, through agents, with citizens of another, constitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser, are free from state taxation, but, if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution."

In Norfolk W. R. Co. v. Sims[77] a license tax imposed by a State upon all persons engaged in selling sewing machines in the State was held void as applied to the sale of machines shipped into the State upon the written order of a customer under an ordinary C. O. D. consignment.[78]

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[77] 191 U. S. 441; 24 Sup. Ct. Rep. 151; 48 L. ed. 254.

[78] To the contention that because in a C. O. D. consignment the sale could not be said to be consummated until delivery, that is, that the sale was made in the State by the express company delivering the machine, which company thereby became liable to the tax, the court say: "The sewing machine was made and sold in another State, shipped to North Carolina in its original package for delivery to the consignee upon payment of its price. It had never become commingled with the general mass of property within the State. While technically the title of the machine may not have passed until the price

In Adams Express Co. v. Iowa[79] the cases of Caldwell v. North Carolina and Norfolk W. R. Co. v. Sims are examined and approved.

In Rearick v. Pennsylvania[80] it was held that interstate commerce is unlawfully burdened by the exaction of a license fee from a person employed by a foreign corporation to solicit sales for goods which the company fills by shipping the goods to him for delivery and collecting the purchase price from the customer, who has the right to refuse the goods if not equal in quality to the sample, such goods being always shipped in distinct packages, corresponding to the several orders.[81]

In Ware v. Mobile[82] it was held that the business of taking orders on commission for the purchase and sale of grain and cotton for future delivery, and transmitting such orders is not interstate commerce, so as to be exempt from state taxation.[83]

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was paid, the sale was actually made in Chicago; and the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exception of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce."

[79] 196 U. S. 147; 25 Sup. Ct. Rep. 185; 49 L. ed. 424.

[80] 203 U. S. 507; 27 Sup. Ct. Rep. 159; 51 L. ed. 295.

[81] Except in the case of brooms which, after being marked and tagged, were for convenience of shipment, tied together into bundles of twelve or more. As to these brooms it was contended that the original bundle or package being broken before delivery the full authority of the State over them at once attached. To this Justice Holmes, who delivered the opinion of the court, said: "But the doctrine of the original packages concerns the right to sell, within the prohibiting or taxing State, goods coming into it from outside. When the goods have been sold before arrival the limitations that still may be found to the power of the State will be due, generally, at least, to other reasons, and we shall consider whether the limitations may not exist, irrespective of that doctrine, in some cases where there is no executed sale." These limitations are found in the doctrines laid down in Brennan v. Titusville and American Express Co. v. Iowa. "The brooms were specifically appropriated to specific contracts, in a practical, if not in a technical sense. Under such circumstances it is plain that, whatever might have been the title, the transport of the brooms for the purpose of fulfilling the contracts was protected commerce." The statement of the case is from the syllabus.

[82] 209 U. S. 405; 28 Sup. Ct. Rep. 526; 52 L. ed. 855.

[83] After calling attention to cases like Paul v. Virginia and Hooper v. California in which it was held that contracts are not the subjects of interstate commerce simply because negotiated between citizens of different States, or

§ 331. Peddlers.

As has been before seen, when property which has been introduced into a State has become commingled with the other property of that State, it ceases to enjoy the protection of the Com-

by the agent of a company in another State, where the contract is to be completed and executed wholly within the borders of the State, even though such contracts may incidentally affect interstate trade, the court observe: "These cases are not in conflict with those in which it is held that the negotiation of sales of goods in a State by a person employed to solicit for them in another State, the goods to be shipped from the one State to the other is interstate commerce. . . . In these cases goods in a foreign State are sold upon orders for the purpose of bringing them to the State which undertakes to tax them, and the transactions are held to be interstate commerce, because the subject matter of the dealing is goods to be shipped in interstate commerce; to be carried between States and delivered from vendor to purchaser by means of interstate carriage. But how stands the present case upon the facts stipulated? The plaintiffs in error are brokers who take orders and transmit them to other States for the purchase and sale of grain or cotton upon speculation. They are, in no just sense, common carriers of messages, as are the telegraph companies. For that part of the transactions, merely speculative and followed by no actual delivery, it cannot be fairly contended that such contracts are the subject of interstate commerce; and concerning such of the contracts for purchases for future delivery as result in actual delivery of the grain or cotton, the stipulated facts show that, when the orders transmitted are received in the foreign State, the property is bought in that State and there held for the purchaser. The transaction was thus closed by a contract completed and executed in the foreign State, although the orders were received from another State. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one State to the place of delivery in another State. And though it is stipulated that shipments were made from Alabama to the foreign State in some instances, that was not because of any contractual obligation to do so. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic because of the contracts made by the brokers. These contracts are not, therefore, the subject of interstate commerce any more than in the insurance cases, where the policies are ordered and delivered in another State than that of the residence and office of the company. The delivery, when one was made, was not because of any contract, obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject matter of the purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."

merce Clause. And thus it has been held that peddlers, as distinguished from drummers, that is, persons who carry with them the articles which they sell, or at least supply the articles sold from stocks of merchandise already in the State, may be required to pay a license fee, even though they deal exclusively with goods which have been imported from another State; provided, however, of course, that they are not discriminated against because of the fact that they sell goods brought in from outside the State.

In Machine Co. v. Gage[84] and in Emert v. Missouri[85] state laws imposing license fees upon peddlers were upheld as to persons selling exclusively sewing machines manufactured outside of the State and sent into the State to the peddlers to be disposed of by them as the agents of the manufacturers.

In Emert v. Missouri the court say: "The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the State of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine which he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one State to another; and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce. The only business and commerce in which he was engaged was internal and domestic; and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the State. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the State."

The court then goes on to point out that there was no discrimination against goods manufactured outside of the State, and that the statute in question was rather a police regulation to protect against fraud, than a revenue measure.

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[84] 100 U. S. 676; 25 L. ed. 754.

[85] 156 U. S. 296; 15 Sup. Ct. Rep. 367; 39 L. ed. 430.

§ 332. State Taxation of Articles of Commerce.

In Brown v. Maryland,[86] decided in 1827, it had been held that a state law requiring all importers of foreign goods, and others selling the same by wholesale to pay a license fee was repugnant to the Commerce Clause.[87] A tax on the sale of an imported article is declared to be a tax on the article itself; and a tax on the importer a tax on the business of importing.

In Woodruff v. Parham[88] the doctrine declared in Brown v. Maryland was declared applicable only to imports from foreign countries. As to these it was declared the States might not exercise their taxing powers until, by the breaking of the original package, or sale by the importer, they had become commingled with the general goods of the States. This limitation upon the taxing power of the States was deduced from the constitutional prohibition as to the laying of export or import duties.

As to goods brought into the State from other parts of the United States, however, it was held that this constitutional prohibition does not apply, the terms export and import duties being declared to relate to foreign commerce only. And as to the Commerce Clause it was held that so long as the articles brought in are not discriminated against, no interference with interstate commerce is caused by their taxation, even in their original packages and unsold in the hands of the original consignee.

It will thus be seen that though the States may not, without the permission of Congress, extend the authority of their police regulations over articles of interstate commerce so long as they remain unsold and in their original packages in the hands of their original consignees, the law is otherwise as regards the taxing power. The distinction in favor of the taxing power is, according to the argument of the court in Woodruff v. Parham drawn from the consequences that would follow from an adoption of a contrary position, and from the purpose of the Commerce Clause in the minds of the

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[86] 12 Wh. 419; 6 L. ed. 678.

[87] And also that it was repugnant to the clause prohibiting the States from levying duties on exports and imports.

[88] 8 Wall. 123; 19 L. ed. 382.

framers of the Constitution, as shown in the historical records that have come down to us.

§ 333. State Taxation of Goods in Transit.

A difficulty which has not infrequently arisen with reference to the amenability of articles of interstate commerce to state taxation is the question when an article may fairly be said to be *in transitu* and when it may be said to have obtained a taxable *situs* in the State. That an article actually in transit from one State to another is not taxable by a State is admitted. That an article manufactured for interstate trade and intended to be sent outside the State, but its transportation thither not yet begun, is taxable in the State where located, is equally well established.

In Brown v. Houston[89] it was held that coal from another State, unsold, and for sale upon the barge upon which it had been brought, was taxable by the State. The court said: "The tax was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. . . . It had become a part of the general mass of property in the State, and as such it was taxed for the current year, as all other property in the city of New Orleans was taxed. . . . It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana."

The court go on to say: "When Congress shall see fit to make a regulation of the subject of property transported from one State to another, which may have the effect to give it a temporary exemption from taxation in the State to which it is transported, it

[89] 114 U. S. 622; 5 Sup. Ct. Rep. 1091; 29 L. ed. 257.

will be time enough to consider any conflict that may arise between such regulation and the general laws of the State."

In Coe v. Errol[90] the question was as to the taxation of certain logs cut in the State and drawn to another place in the State, whence they were to be floated down stream to a place outside the State. Because of low water they had not yet started upon this interstate portion of their trip. The logs were held taxable, the court thus fixing the doctrine that articles deposited or stored at an entrepôt for future interstate transportation are taxable by the State in which they are situated.

In Diamond Match Co. v. Ontonagon,[91] however, it was held that logs cut and floated down a stream to a boom or sorting gap, from which they were to be shipped by rail outside the State, were, while awaiting delivery to the railroad, *in transitu* and not subject to state taxation.

In Kelley v. Rhoads[92] it was held that sheep while being driven across the State of Wyoming, to the State of Nebraska at the rate of about nine miles a day, were exempt from taxation under a Wyoming law authorizing the taxing of live stock brought into the State for grazing purposes, although the sheep were permitted, incidentally, while in transit, to support themselves by grazing.[93]

In American Steel & Wire Co. v. Speed[94] the foregoing authorities are reviewed, and the doctrine declared that a State is not precluded by the Commerce Clause from imposing a manufacturer's tax upon a non-resident manufacturing corporation which has selected a city of the State as a distributing point, and engaged a local transfer company to take charge of its products when shipped to that point, assort them, store them and make delivery of them in the original packages to the firm's customers. Such goods, when stored, were declared to be no longer in transit.

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[90] 116 U. S. 517; 6 Sup. Ct. Rep. 475; 29 L. ed. 715.

[91] 188 U. S. 82; 23 Sup. Ct. Rep. 266; 47 L. ed. 394.

[92] 188 U. S. 1; 23 Sup. Ct. Rep. 259; 47 L. ed. 359.

[93] The court observe: "We do not deny that it may have been the plaintiff's intention not only to graze, but to fatten his sheep, while *en route* to Wyoming. Indeed, we may suspect it, but there is nothing in the agreed statement of facts to justify that inference."

[94] 192 U. S. 500; 24 Sup. Ct. Rep. 365; 48 L. ed. 538.

or does hinder the efficient exercise of this power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operation is a direct obstruction to the exercise of federal powers."

In Postal Telegraph Cable Co. v. Adams[5] the court say:

"It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment. . . . Doubtless, no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce, but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by a reference thereto, it is not open to attack as inconsistent with the

[5] 155 U. S. 688; 15 Sup. Ct. Rep. 268; 39 L. ed. 311.

Constitution. (Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439; 14 Sup. Ct. Rep. 1122; 38 L. ed. 1041)."

§ 336. Assessment of Property of Interstate Carriers for Purposes of Taxation.

In Henderson Bridge Co. v. Kentucky[6] it is held that, in assessing for taxation the property of a bridge company owning and operating a bridge across the Ohio river, connecting the shores of Kentucky and Indiana, the value of the franchise granted by the taxing State might be included as intangible property, and that the value of this franchise might be estimated by taking the total value of the entire property and subtracting therefrom the value of the tangible property in the taxing State and the value of all the property, tangible and intangible, in the other State.[7]

In Keokuk, etc., Bridge Co. v. Illinois[8] it was held that a state tax on the capital stock of a bridge company consolidated from corporations of different States, which maintains an interstate bridge, is not a tax on a franchise conferred by the Federal Government, although the corporation had an authority under an act of Congress to construct the bridge. Also that such a tax was not a taxation of interstate commerce, because the bridge company did not itself transact any interstate business over it. The court quote with approval the statement in Henderson Bridge Co. v. Kentucky[9] that "clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted."

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[6] 166 U. S. 150; 17 Sup. Ct. Rep. 532; 41 L. ed. 953.

[7] Four justices dissented.

[8] 175 U. S. 626; 20 Sup. Ct. Rep. 205; 44 L. ed. 299.

[9] 166 U. S. 150; 17 Sup. Ct. Rep. 532; 41 L. ed. 953.

§ 337. Vessels: Rolling Stock: Unit of Use Rule.

Vessels, for purposes of taxation, have, generally speaking, a *situs* at their home ports, that is, where registered, irrespective of where they are doing business. Where, however, it appears that a boat is permanently located in another State and doing business there, it may be taxed there.[10]

In determining for purposes of taxation the amount of rolling stock of an interstate carrier, it has been held that a State may ascertain the average number of cars continuously employed in the State, though no particular car may in fact be kept permanently employed in the State.[11]

When valuing the property of carrier companies whose property extends over several States, each State is permitted to tax the amount of property within its own limits and to give to that amount a value bearing the same proportion to the value of the entire property of the company as the length of railway or telegraph or telephone line bears to the total length of the carrier system which is assessed. This, the court declared proper in W. U. Telegraph Co. v. Mass.[12] and again in Pullman Palace Car Co. v. Pennsylvania,[13] in the latter case saying that the method "was a just and equitable method of assessment, and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole of its capital stock and no more."

The court have, however, at times pointed out that this method of assessment is after all but a convenient one applicable in some cases, and that it is not to be erected into an absolute principle; for it might not be acceptable in those cases where it would work obvious injustice. An example of this would be where a railroad company has a large mileage in one State, but over land where

[10] *Cf.* Judson, *Taxation*, § 189.

[11] Pullman Palace Car Co. v. Penn., 141 U. S. 18; 11 Sup. Ct. Rep. 876; 35 L. ed. 613; Union Refrigerator Transit Co. v. Ky., 199 U. S. 194; 26 Sup. Ct. Rep. 36; 50 L. ed. 150; American Refrigerator Transit Co. v. Hall, 174 U. S. 70; 19 Sup. Ct. Rep. 599; 43 L. ed. 899.

[12] 125 U. S. 530; 8 Sup. Ct. Rep. 961; 31 L. ed. 790.

[13] 141 U. S. 18; 11 Sup. Ct. Rep. 876; 35 L. ed. 613.

construction expenses had been very inexpensive, and where terminal facilities were few and not costly, while in another State its mileage is small, but of expensive construction, and its terminal facilities elaborate and costly.[14]

The chief constitutional objection to this method of valuation has been that the value of the property is based in very great degree upon its use as an instrument of interstate commerce, and that, therefore, a tax assessed upon this value is, in effect, a tax upon that commerce. This contention was urged with especial force, but without success, in the case of Adams Express Co. v. Ohio.[15] In this case the state statute required the board of assessors "to proceed to ascertain and assess the value of the property of express, telegraph and telephone companies in Ohio, and in determining the value of the property of said companies in this State to be taxed within the State and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid." [16]

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[14] *Cf.* Judson, *Taxation*, § 261.

[15] 165 U. S. 194; 17 Sup. Ct. Rep. 305; 41 L. ed. 683.

[16] In behalf of the express companies it was contended that the law sought to tax property beyond the territorial jurisdiction of the State, and that it imposed a burden on interstate commerce. The court, however, speaking through Chief Justice Fuller, said: "Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and, whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce, otherwise than incidentally, as all business is

In the Express Company case was thus established what is known as the "unit of use" rule, according to which the property of a company may be determined as a unity, if used as a single system, and that its value may be assessed for purposes of taxation at the value which, as such a unity, it has in use, namely, the net profits which it produces, and irrespective of what may be the value of the tangible property which is owned or employed; and

affected by the necessity of contributing to the support of government. As to railroad, telegraph, and sleeping-car companies engaged in interstate commerce, it has been often held by this court that their property in the several States through which their lines or business extended might be valued as a unit for the purposes of taxation taking into consideration the uses to which it was put, and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State without violating any federal restriction. The valuation was thus not confined to the wires, poles and instruments of the telegraph company, or the roadbed, ties, rails, and spikes of the railroad company, or the cars of the sleeping company, but included the proportionate part of the value resulting from the combination of the means by which the business was carried on,—value existing to an appreciable extent throughout the entire main of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular State is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole (Railway Co. v. Backus, 154 U. S. 439; 14 Sup. Ct. Rep. 1122; 38 L. ed. 1041), or taking as the basis of assessment such proportion of the capital stock of a sleeping-car company as the number of miles of railroad over which its cars are run in a particular State bears to the whole number of miles traversed by them in that and other States (Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; 11 Sup. Ct. Rep. 876; 35 L. ed. 613), or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a State bears to the length of its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State (W. U. Tel. Co. v. Taggart, 163 U. S. 1; 16 Sup. Ct. Rep. 1054; 41 L. ed. 49). Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use. The cars of the Pullman Company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to the valuation which was sustained in that case. The cars were moved by railway carriers under contract, and the taxation of the corporation in Pennsylvania was sustained on

that where this system extends into two or more States each State may, for purposes of taxation, consider as within its borders, an amount of property proportioned to the whole, as the amount of business done within the State is proportioned to total amount of business done.[17]

§ 338. State Taxation of Receipts from Interstate Commerce.

A state tax directly upon and measured by the amount of freight carried is, as to interstate freight, a tax on interstate commerce and as such void.[18]

In State Tax on Railway Gross Receipts,[19] however, the court upheld a tax on the gross receipts of the railways, including receipts from interstate commerce, the amount of such receipts being assessed in proportion to the mileage in the State; the ground being taken that the tax was upon a fund which had become the property of the company and mingled with its other property. The court say: "The tax is not levied, and indeed such a tax cannot be, until the expiration of each half year, and until the money received for freights, and from other sources of income, has actually come into the company's hand. Then it has lost its distinctive character as freight earned, by having become incorporated into the general mass of the company's property."

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the theory that the whole property of the company might be regarded as a unit plant, with a unit value, a proportionate part of which value might be reached by the state authorities on the basis indicated."

In American Refrigerator Transit Co. v. Hall (174 U. S. 70; 19 Sup. Ct. Rep. 599; 43 L. ed. 899) the foregoing language is quoted and approved, it being held in that case that a State may constitutionally tax refrigerator cars used on railroads of the State and required in their business, though owned by a corporation of another State, and being paid for by the railroad company on a mileage basis, though such cars are used within one State wholly for interstate commerce; and that a tax might be fixed upon the value of the average number of cars employed in the State.

[17] In Fargo v. Hart (193 U. S. 490; 24 Sup. Ct. Rep. 498; 48 L. ed. 761) the court held that personal property owned by a non-resident express company and situated outside of the State, could not be taken into account in fixing the value, for taxation, of its property within the State, on the theory that the possession of such property by the company gave to it a better credit and thus a better opportunity to obtain business.

[18] State Freight Tax Cases, 15 Wall. 232; 21 L. ed. 146.

[19] 15 Wall. 284; 21 L. ed. 164.

Though followed in a number of subsequent cases, in Philadelphia SS. Co. v. Pennsylvania[20] the reasoning of the court in State on Gross Receipts was declared unsound and its doctrine abandoned, the court saying: "It would seem to be rather metaphysics than plain logic for the state officials to say to the company 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

The prohibition thus laid upon the States was, however, again substantially done away with in Maine v. Grand Trunk R. R. Co.[21] in which it was held that a State might levy a tax on the right of an interstate railway to exercise its franchises, whether domestic or foreign, within its borders and determine the value of this right, and, therefore, the amount of the tax, by the gross earnings of the company within the State as determined by its mileage therein.

The position of the court in this case has met with much criticism and it would seem impossible to harmonize it with earlier cases.[22]

Though later affirmed,[23] a recent case indicates that the doctrine of Maine v. Grand Trunk R. Co. is to be strictly construed and that the principle declared in Philadelphia SS. Co. v. Pennsylvania is still unshaken. In the case of Galveston H. & S. A. R. R. Co. v. Texas[24] was held invalid a state law which levied a tax upon railway companies, whose lines lay wholly within the State, "equal to one per centum of their gross receipts," it appearing that a part, and in some cases a considerable part of these receipts, were derived from the carriage of persons or freight coming from or destined to points without the State. After declaring the case of Philadelphia SS. Co. v. Pennsylvania to be unshaken, the

[20] 122 U. S. 326; 7 Sup. Ct. Rep. 1118; 30 L. ed. 1200.

[21] 142 U. S. 217; 12 Sup. Ct. Rep. 121; 35 L. ed. 994.

[22] See the dissenting opinion of Justice Bradley.

[23] N. Y., etc., R. R. Co. v. Pennsylvania, 158 U. S. 440; 15 Sup. Ct. Rep. 900; 39 L. ed. 1046.

[24] 210 U. S. 217; 28 Sup. Ct. Rep. 638; 52 L. ed. 1031.

all the cases. This is, that a state tax is invalid, whatever its form, if in effect it lays a direct burden upon interstate commerce; and that, conversely, a state tax is valid, however measured, or (if we follow the doctrine of Maine v. Grand Trunk Ry.) whatever its form, which may be fairly held to be a tax on the property of the company, whether tangible or intangible. The tax being thus valid, if valid at all, only as a property tax, it may never amount to more than an ordinary property tax, and its non-payment may never involve a forfeiture of the right of the company to do an interstate commerce business. The doctrine of Maine v. Grand Trunk Ry. that a tax measured by the gross receipts may be sustained as a franchise or excise tax upon the right of the company to do business in the State is certainly unsound, and is, it would appear, as above indicated, so recognized by the court in Galveston H. & S. A. R. R. Co. v. Texas.

Perhaps the general doctrine which we have been considering is best stated and illustrated in Postal Telegraph Cable Co. v. Adams,[26] in which it was held that a State has the power to levy on a foreign telegraph company doing both a domestic and an interstate business a franchise tax, the amount thereof being graduated according to the value of the property within the State, such tax being in lieu of all other taxes. Though in terms a franchise tax, the tax was held valid as, in fact, taking the place of a property tax which, of course, the State might constitutionally levy. The court say: "A tax [may be] imposed on the corporation on account of its property within the State and may take the form of a tax on the privilege of exercising its franchises within the State, and if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be levied directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

[26] 155 U. S. 688; 15 Sup. Ct. Rep. 268; 39 L. ed. 311.

§ 339. Taxation of Net Receipts.

It would appear that the same rules apply to the state taxation of net receipts of companies doing an interstate commerce business as govern in the case of the taxation of gross receipts. It may, however, be observed, that should the court seek to justify the taxation of receipts by an assumption that they have, when taxed, become a part of the property of the companies receiving them, as was, for example, asserted in State Tax on Railway Gross Receipts,[27] the argument is especially strong as to net receipts. It is believed, however, that the courts will not in the future place any reliance upon this argument which is, at its best, an exceedingly weak one.[28]

§ 340. Charter Provisions.

The State which grants a charter to a railway corporation may, as a condition precedent to the grant, stipulate that the company shall pay into the State's treasury a certain percentage of its receipts, or be liable to a certain tax on the amount of its capital stock, or to a special property tax, and the fact that these receipts are derived from its interstate commerce business, or that its property is so employed does not render the stipulation void. The sums so paid are not paid because of the interstate commerce done, but as a payment to the State for the charter which it has obtained, and which the State could grant or withhold as it might see fit.[29]

But a State may not in a charter which it grants reserve to itself a right to regulate the interstate commerce business of a corporation, for it does not lie within the power of a State thus by its own act to obtain an authority over matters vested exclusively in the Federal Government.[30]

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[27] 15 Wall. 284; 21 L. ed. 164.

[28] See the dissenting opinion of Justice Miller in State Tax on Railway Gross Receipts.

[29] Railroad v. Maryland, 21 Wall. 456; 22 L. ed. 678. *Cf.* Prentice and Egan, *Commerce Clause*, p. 299, and authorities there cited.

[30] Louisville R. R. Co. v. Railroad Com. of Tenn., 19 Fed. Rep. 679.

§ 341. Taxation of Capital Stock of Interstate Commerce Companies.

Because of the control which a State has over corporations of its own creation, it is held that it may tax the entire capital stock of domestic corporations, even though some of the property of those corporations is situated outside of the taxing State. For such a tax is held to be not upon the property which in large measure gives the value to the capital stock, but upon the corporation as an entity, over which entity the State has full personal jurisdiction. The same rule is applied to foreign corporations which have been permitted to consolidate with and thus become constituent elements of domestic corporations.[31]

As to foreign corporations doing an interstate commerce business, it is held that their capital stock may be taxed only to the extent that such corporations have property within the taxing States.[32] This doctrine has not been questioned since the decision of Gloucester Ferry Co. v. Pennsylvania.[33]

In Western Union Telegraph Co. v. New Hope[34] and Atlantic & Pacific Tel. Co. v. Philadelphia[35] the court has laid down the doctrine that where, from the nature of the case, a certain amount of police supervision of an interstate carrier on the part of the State or of one of its political subdivisions is needed, a charge, in the form of a tax, sufficient to meet approximately the expenses of such supervision may be imposed by the State or its political subdivisions. The fact that, in result, a revenue somewhat greater than the actual cost of supervision is derived does not render the

[31] Ashley v. Ryan, 153 U. S. 436; 14 Sup. Ct. Rep. 865; 38 L. ed. 773; The Delaware Railroad Tax, 18 Wall. 206; 21 L. ed. 888; State Railroad Tax Cases, 92 U. S. 575; 23 L. ed. 663.

[32] As to whether when such corporations seek to do other than an interstate commerce business in States other than those of their origin, conditions may be attached to the permission so to do, and whether these conditions may take the form of a tax on capital stock, or any other form of tax, see W. U. Tel. Co. v. Kansas, 216 U. S. 1; 30 Sup. Ct. Rep. 190; and Pullman Co. v. Kansas, 216 U. S. 54; 30 Sup. Ct. Rep. 232.

[33] 114 U. S. 196; 5 Sup. Ct. Rep. 826; 29 L. ed. 158.

[34] 187 U. S. 419; 23 Sup. Ct. Rep. 204; 47 L. ed. 240.

[35] 190 U. S. 160; 23 Sup. Ct. Rep. 817; 47 L. ed. 995.

tax void, but such excess cannot be sufficient to make the tax essentially a revenue measure.

"Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a question for the courts, and is to be determined upon a view of the facts and not upon evidence consisting of the opinions of witnesses as to the proper supervision that the municipal authorities might properly exercise and expense of the same."[36] In Atlantic & Pacific Tel. Co. v. Philadelphia, however, the court point out that the function of the court, as to the reasonableness of the regulation, is to pass upon the character of the regulations prescribed, and whether a charge upon the supervised company is proper; and that it is the function of the jury to pass upon the question as to the reasonableness of the amount of the charge in the particular case at issue. "What is reasonable in one municipality may be oppressive and unreasonable in another."

§ 342. State Regulation of Carriers.

In the absence of congressional regulation the common law of the States controls with reference to the so-called common-law rights, duties, and responsibilities of interstate carriers. These rights and duties which relate to reasonableness of service, impartiality of treatment of shippers, liabilities either contractual or in tort for injuries to passengers or freights, etc., have, in many instances, it is apparent, more than a local significance and effect, and it is, therefore, somewhat difficult to justify, upon principle, the constitutional authority of the States in these respects. Practical necessity and convenience seem, however, to have demanded that this validity should be ascribed to the common law of the States, for otherwise, in the absence of congressional regulation, there would be no law whatever for the courts to apply.[37]

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[36] Quoted with approval in Western Union Tel. Co. v. New Hope, from opinion of the court in Philadelphia v. W. U. Tel. Co., 32 C. C. A. 246.

[37] That there is no federal common law which, in absence of congressional statute, can be made use of is fairly certain. *Cf.* United States v. Worrall, 2 Dall. 384; 1 L. ed. 426; Wheaton v. Peters, 8 Pet. 591; 8 L. ed. 1055. But see Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92; 21 Sup. Ct. Rep. 561; 45 L. ed. 765.

In Murray v. Chicago & N. W. Ry. Co.[38] the argument *ab inconvenienti* is adopted as controlling.

The doctrine that in the absence of congressional action, these common-law principles should apply even with reference to interstate commerce carriers was declared in a number of cases, and without serious dissent;[39] but in Western Union Tel. Co. v. Call Pub. Co.[40] the point was pressed that the giving to state law an operation over interstate commerce with reference to matters not purely local was unconstitutional. The court reaffirmed the doctrine, but as will appear from the following quotations from its opinion, upon no stronger grounds than convenience and necessity. The court say:

"The contention of the telegraph company is substantially that the services which it rendered to the publishing company were a matter of interstate commerce; that Congress has sole jurisdiction over such matters, and can alone prescribe rules and regulations therefor; that it had not, at the time the services were rendered, prescribed any regulations concerning them; that there is no national common law, and that whatever may be the statute or common law of Nebraska is wholly immaterial; and that, therefore, there being no controlling statute or common law, the court erred in holding the telegraph company liable for any discrimination in its charges between the plaintiff and the Journal Company. . . . The logical result of this contention is that persons dealing with common carriers engaged in interstate commerce and in respect to such commerce are absolutely at the mercy of the carriers. It is true, counsel do not insist that the telegraph company or any other company engaged in interstate commerce may charge or contract for unreasonable rates, but they do not say that they may not; and if there be neither statute nor common law controlling the action of interstate carriers, there is nothing to limit their obligation in respect

[38] 62 Fed. Rep. 24.

[39] Interstate Commerce Com. v. B. & O. R. R. Co., 145 U. S. 263; 12 Sup. Ct. Rep. 844; 36 L. ed. 699; Bank of Kentucky v. Adams Express Co., 93 U. S. 174; 23 L. ed. 872; Murray v. C. & N. W. R. R. Co., 62 Fed. Rep. 24.

[40] 181 U. S. 92; 21 Sup. Ct. Rep. 561; 45 L. ed. 765.

to the matter of reasonableness. We should be very loth to hold that in the absence of congressional action there are no restrictions on the power of interstate carriers to charge for their services; and, if there be no law to restrain, the necessary result is that there is no limit to the charges they may make and enforce. . . . Common carriers, whether engaged in interstate commerce or in that wholly within the State, are performing a public service. They are endowed by the State with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. . . . To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling. . . . Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment.[41]

§ 343. State Regulation of Railway Rates.

The general constitutional power of the States to regulate the rates of public service corporations, including railway and other transportation corporations, whether of domestic or foreign incorporation, as well as of industries affected by a public interest is well established. The only federal limitations upon this power

[41] See also Sherlock v. Alling, 3 Otto, 99; 23 L. ed. 819; Missouri R. R. Co. v. Larabee Flour Co., 211 U. S. 612; 29 Sup. Ct. Rep. 214; 53 L. ed. 352; McNeill v. Southern R. R. Co., 202 U. S. 543; 26 Sup. Ct. Rep. 722; 50 L. ed. 1142; Chicago R. R. Co. v. Solan, 169 U. S. 133; 18 Sup. Ct. Rep. 289; 42 L. ed. 688; Lake Shore R. R. Co. v. Ohio, 173 U. S. 285; 19 Sup. Ct. Rep. 465; 43 L. ed. 702. *Cf. Columbia Law Review*, IX, 375, article by E. Parmalee Prentice, "Federal Common Law and Interstate Commerce."

are: those of the Fourteenth Amendment requiring the equal protection of the laws and that the rates thus fixed shall not be so unreasonable as to amount to a taking of property without due process of law; and that under the guise of an attempt at the regulation of domestic services interstate commerce shall not be unduly affected. That to a certain extent the regulation of domestic railway rates should affect interstate service has been recognized by the courts as unavoidable, but, so long as this interference is not too pronounced or serious, the laws have not been held thereby unconstitutional and void.[42]

[42] There are eminent jurists who, however, hold that the Supreme Court has been too extreme and, indeed, illogical, in the degree in which it has permitted the States, in the regulation of domestic railway rates, substantially to affect interstate rates. Certain it is that under the pressure of increased need, there is the way opened for the federal courts, when they desire to do so, greatly to limit, by a stricter construction of state laws, the powers at present enjoyed and exercised by the States in the regulation of domestic railway rates. Judge Amidon in an address before the American Bar Association, delivered in 1907, has excellently expressed this point of view. He says: "Whenever a State prescribes a schedule of rates for local business, it thereby directly and necessarily regulates interstate business as well. There can be no sudden lifts and falls at state lines. They have no relation whatever to the cost of service, and can afford no justification for discrimination in rates. As the result of the schedule of rates prescribed by the State of Minnesota during the past winter, the rates on the western side of an invisible line were from twenty-five to fifty per cent. higher than those on the eastern side. The railroads could not maintain both these rates without discriminating against North Dakota points in a manner which would constitute a gross violation of that portion of the interstate commerce act which forbids discrimination against any locality. The necessary result of the enforcement of the local rates was to compel a reduction of all through rates. This the Supreme Court has decided is such a direct interference with interstate commerce as to render the action of the State void. But further, if one State may prescribe a schedule of rates, all States may, and the inevitable result of such a practice is to place the whole body of interstate commerce under the actual domination of state laws. In that way the authority which extends to only fifteen per cent. of the business, regulates the entire business. The necessary consequence is that either the nation must take control of railroad transportation within the States or the States will take control of such transportation among the States. We deceive ourselves by a mere form of words when we speak of the separate regulation of local business by the State and through business by the nation. The State cannot formulate and enforce any schedule of rates which will not necessarily and directly regulate interstate rates; neither can the

In a series of cases beginning with Munn v. Illinois[43] the court conceded to the States the constitutional power to fix rates of public service corporations with reference not only to purely domestic business, but to the portions of interstate services performed within the State.[44] But in Wabash, St. L. & P. R. Co. v. Illinois[45] a quite different doctrine is declared, the court holding that the state laws fixing railway rates cannot be applied to any part of an interstate transportation. The court say: "If the Illinois statute could be construed to apply exclusively to contracts for carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid." But this, the court held, was not the limited effect of the statute, and, after reviewing the earlier cases, the court declare: "We must therefore hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges of railway companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law."

In Covington & Cincinnati Bridge Co. v. Kentucky[46] the question is again carefully examined, and the doctrine of the Wabash case affirmed. "To that doctrine," the court declare, "we still adhere." In this bridge case it was held that a State is without the power to regulate tolls upon a bridge connecting the State with another State.

In still further limitation of the power of the States to regulate domestic rates of public service corporations, is the doctrine

nation formulate and enforce any schedule of interstate rates which will not necessarily and directly change local rates. The truth is that governmental regulation of rates is not a regulation of commerce, but of the railroads as an instrument of commerce, and when the nation and the State both prescribe to a railroad a schedule of rates, they are both regulating the same thing. This gives rise to a conflict of authority which Marshall declared in Gibbons v. Ogden ought never to be permitted to occur."

[43] 94 U. S. 113; 24 L. ed 77.

[44] C. B. & Q. R. Co. v. Iowa, 94 U. S. 155; 24 L. ed. 94; Peik v. C. & N. W. R. Co., 94 U. S. 164; 24 L. ed. 97.

[45] 118 U. S. 557; 7 Sup. Ct. Rep. 4; 30 L. ed. 244.

[46] 154 U. S. 204; 14 Sup. Ct. Rep. 1087; 38 L. ed. 962.

that a State, in determining whether a proposed rate will leave a reasonable net profit to the company, may not take into consideration the entire business of the company if some of that business is interstate in character. In Smyth v. Ames[47] the justice says: "In my judgment it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the State,— can have no application where the State is without authority over rates on the entire line, and can only deal with local rates, and make such regulations as are necessary to give just compensation on local business."

It is established that the fact that a railway company is organized under a federal charter does not exempt it from the same regulative control by the States as that to which state chartered companies are subject. This doctrine is stated in Reagan v. Trust Co.,[48] the court pointing out that it is to be presumed that Con-

[47] 169 U. S. 466; 18 Sup. Ct. Rep. 418; 42 L. ed. 819.
[48] 154 U. S. 418; 14 Sup. Ct. Rep. 1062; 38 L. ed. 1030.

gress will expressly provide for those cases in which the interest of the nation, and the discharge of federal duties, if any are imposed, require the exemption of the road from state control.

In Smyth v. Ames[49] this principle is approved, in that case the court holding that even the express reservation by Congress of the authority to reduce rates of fare when found unreasonably high, and to fix rates and establish them by law whenever the net earnings of the road, ascertained upon a named basis, should exceed a certain amount, was not to be taken as evidence that Congress, when not itself acting, desired to exempt the road from state regulation as to charges for transportation begun and completed within the State. "It ought not to be supposed," the court say, "that Congress intended, that, so long as it forbore to establish rates on the Union Pacific Railroad, the corporation itself could fix such rates for transportation as it saw proper, independently of the rights of the States through which the road was constructed to prescribe regulations for transportation beginning and ending within their respective limits. . . . Congress not having exerted this power, we do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a State prescribing rates for transporting property on that road wholly between points within its territory."

§ 344. Routes Running Outside the State but with Both Terminals Within the State.

It is established that a State may not, without violating the Commerce Clause, fix and enforce rates for the continuous transportation of goods between two points within the State, when a part of the route is, however, outside the State. The doctrine though not at first very positively stated may be considered as firmly adopted since the decision of Hanley v. Kansas City Southern R. Co.[50]

It would seem that the doctrine as to the taxation of receipts for transportation over routes running outside the State but between

[49] 169 U. S. 466; 18 Sup. Ct. Rep. 418; 42 L. ed. 819.

[50] 187 U. S. 617; 23 Sup. Ct. Rep. 214; 47 L. ed. 333. See also U. S. v. D. L. & W. R. Co. (C. C.), 152 Fed. Rep. 269.

points within the State is not to be so strictly construed against the States as is that of the regulation of the rates. This is on the theory that the transportation over such routes is a unit and must be charged for as such, whereas a tax on the railway company based on the amount of transportation over its roads within the State is a reasonable one. Such a tax as this was upheld in Lehigh Valley R. Co. v. Pennsylvania[51] and, it is to be admitted, that the language employed by the court would seem to indicate that commerce carried on between two points within the same State is to be considered in all cases domestic even when part of the route lies outside the State.[52] But when the attempt was made to apply the same doctrine to the state regulation of rates, the court, in Hanley v. Kansas City Southern R. Co. speaking of the decisions of state courts which had applied the doctrine of the Lehigh case to rate regulation said: "We are of opinion that they carry their conclusion too far. That [the Lehigh case] was the case of a tax, and was distinguished expressly from an attempt of a State directly to regulate the transportation while outside its borders."

[51] 145 U. S. 192; 12 Sup. Ct. Rep. 806; 36 L. ed. 672.

[52] The court say: The question "is simply whether, in the carriage of freight and passengers between the points in one State, the mere passage over the soil of another State renders that business foreign, which is domestic. We do not think that such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk."

CHAPTER XLIII.

FEDERAL LEGISLATIVE POWER OVER INTERSTATE COMMERCE.

§ 345. Federal Legislation.

In the chapters which have gone before, the extent of the powers of the States with reference to interstate commerce has been considered. In the present chapter we shall have to deal with the extent of the regulative, that is to say, of the legislative power, granted to Congress by the Commerce Clause.

Until 1887 the constitutional power granted the Federal Government by the Commerce Clause was employed by that government only by way of preventing the exercise of unconstitutional powers by the States. No attempt up to this time was made to put into exercise the affirmative legislative powers granted by that clause. In 1887, however, an act of Congress was passed establishing the Interstate Commerce Commission, and laying down certain regulations in accordance with which interstate commerce should be carried on, and providing for the enforcement of these regulations by the Commission and by the federal courts. In 1890 by the so-called Sherman Anti-Trust Act, interstate commerce was subjected to still further regulation; and, by the act of 1906, the whole matter of regulating railway rates subjected to affirmative federal control. By these and by other less important legislative acts, as well as by other and more radical measures which have been urged for enactment by Congress, the question as to the extent of the legislative powers of Congress with reference to foreign and interstate commerce has become one of great present importance. The character of the legislation already enacted will appear in the discussion which is to follow.

Over interstate commerce, the Federal Government has an authority equal in extent to that possessed by the States over domestic commerce or by the United States with reference to foreign commerce. This the Supreme Court has repeatedly declared.[1]

[1] "The power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations." Brown v. Houston, 114 U. S. 622; 5 Sup. Ct. Rep. 1091; 29 L. ed. 257.

The control of interstate and foreign commerce being granted to the Federal Government without limitation, the grant is, according to the general principle governing the interpretation of grants of federal power, construed to be plenary. This was stated in absolute terms by Marshall in Gibbons v. Ogden,[2] and has never been questioned. "This power," said the Chief Justice, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." [3]

§ 346. Federal Police Regulations.

Congress has enacted various laws for the regulation of interstate and foreign commerce, which, so far as their substance is concerned, may properly be denominated police regulations. Among them are those relating to the use of safety appliances, hours of service of employees, monthly reports of accidents, arbitration of controversies between railroads and their employees, the

[2] 9 Wh. 1; 6 L. ed. 23.

[3] In Champion v. Ames (188 U. S. 321; 23 Sup. Ct. Rep. 321; 47 L. ed. 492) the court, after a review of adjudged cases, say: "The cases cited . . . show that the power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions in the exercise of power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to the utmost extent, subject only to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed."

as to the federal right to exclude lottery tickets from interstate transportation which, whatever might be the morality or expediency of the lottery to which they related, could not, in themselves, be considered a commodity, the transportation of which was attended with danger of injury to interstate trade, the point was urged that Congress was putting the Commerce Clause to a use which its framers had not intended. That, in other words the term "regulation" as employed in that clause could not properly be so defined as to include measures intended, and by necessary effect, calculated not to protect or encourage or regulate interstate commerce itself, but to check an evil the control of which by direct legislation was admittedly beyond the authority of Congress.[7]

To this argument, the Supreme Court in Champion v. Ames, replied that lotteries, though in earlier years considered innocuous, had come to be generally viewed as pestilential and as such had come under the ban of the law of most, if not all, of the States. Therefore, it was argued, the traffic in lottery tickets is one "which no one can be entitled to pursue as of right." "If," the court say, "a State, when considering legislation for the suppression of lotteries within its own limits may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another?" "We should hesitate long," the court go on to declare, "before adjudging that an evil of such appalling character, carried on through interstate commerce cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy by legislation the whole field of interstate commerce."

It is to be admitted that the argument thus advanced is not only a weak one, but leads to a doctrine which, if not necessarily, at least possibly, may be employed to enable the Federal Govern-

[7] *Cf. American Law Review*, XXXVIII, 199; *Political Science Quarterly*, XII, 622; *Michigan Law Review*, I, 620.

ment to bring under its regulative control most of the manufacturing and other industries of the country. In so far as the argument is *ex necessitate,* or *ab inconvenienti,* it is plainly invalid. As the four dissenting justices in their opinion say, "the scope of the Commerce Clause of the Constitution cannot be enlarged because of present views of public interest." The argument of the majority is indeed scarcely distinguishable from what has been denominated the Wilson-Roosevelt doctrine of constitutional construction.[8] And it is certainly improper to speak of lottery tickets as "polluting" interstate commerce. Their carriage cannot in any way be said to exercise an injurious effect upon other articles or persons transported.

As regards the argument that, if it be granted that the Federal Government has the power to prohibit the interstate transportation of lottery tickets, it will logically follow that Congress may arbitrarily exclude from interstate commerce any article or commodity it may see fit, and from whatever motive, the majority justices say: "It will be time enough to consider the constitutionality of such legislation when we must do so."

These justices go on to point out that the power of Congress to regulate commerce among the States though plenary is not arbitrary. They, however, add that the possible abuse of a power is not an argument against its existence.

§ 348. Federal Regulation of Child Labor.

The possible application of the doctrine laid down in the Lottery Case is excellently exemplified in an attempt that has been made, relying upon it, to support the constitutionality of a federal law excluding from interstate commerce articles to the production of which child labor has contributed. The enactment of a bill to the effect has been especially championed in the United States Senate by Mr. Beveridge of Indiana.

This proposed law provides that, under heavy penalties, "no carrier of interstate commerce shall transport or accept for transportation the products of any factory or mine in which children

[8] See *ante,* Section 27.

under fourteen years of age are employed or permitted to work, which products are offered to said interstate carriers by the firm, person, or corporation operating said factory or mine, or any officer or agent, or servant, thereof for transportation into any other State or Territory than the one in which said factory or mine is located."

There has been no concealment, and, indeed, the bill bears sufficient evidence upon its face, of the fact that the purpose of the law is rather a regulation of the manner in which certain goods are manufactured or produced, than of their transportation across state lines. The bill is thus a police measure in exactly the same sense that the Pure Food and Lottery Acts are. But there is a difference between it and them — a difference which possibly will be held controlling. Lottery tickets are, in themselves, the contracts of an undertaking which is very generally regarded as a morally and economically harmful one, and impure foods are, in themselves, harmful to those receiving and consuming them. After the process of manufacture is completed, harm is, therefore, done by the transportation and use of impure foods and lottery tickets, and it is, therefore, arguable that a law prohibiting or regulating their transportation as articles of interstate commerce is a legitimate exercise of the power granted to the General Government to regulate commerce among the States; that is, is an exercise of that power for the advantage of the citizens of the several States.

As to articles manufactured or produced in factories or mines employing children under fourteen years of age, however, the foregoing does not hold true. Whatever injury is done by the employment of children in factories or mines is done when the articles are in process of manufacture or production, and over this manufacturing or mining the Federal Government has, under the Commerce Clause, no control whatever. Except possibly in the rarest instances, goods produced in factories or mines employing children do not differ in character from those produced in factories or mines not employing such labor. Once produced there is, therefore, no harm done to anyone, whether by way of deceit

or injury to the health, by the sale and consumption of these goods so produced. There cannot, therefore, be any valid argument as to the constitutionality of the proposed Child Labor Law upon the ground that it is a legitimate exercise of a federal power to regulate interstate commerce, unless, indeed, one is willing to take the further step of saying that Congress has the arbitrary power to exclude from interstate commerce any commodity that it chooses independently of whether its transmission or transportation is attended by danger, or its sale by unavoidable opportunity for fraud, or its use and consumption followed by moral or physical evils. Or, if admitted to interstate commerce, that Congress may attach, as conditions precedent thereto, any requirements of production that it may see fit to impose. To grant this last is, of course, to break down entirely the distinction between the manufacture of and the interstate trade in commodities, and thus to bring within possible federal control the entire manufacturing interests of the country.

It is plain, from what has been said, that the enactment of a measure of the character of the Child Labor Bill introduced in the Senate by Mr. Beveridge would be an attempt upon the part of the Federal Government to regulate a matter reserved to the control of the States. Should the measure be limited in its operations to goods imported from foreign countries it would not, to be sure, be open to this objection, but it would still be open to the criticism that it would not be, in any sense, a regulation of commerce, and therefore, if valid, the constitutional source of the power of Congress to enact it would have to be sought elsewhere than in the Commerce Clause.

The cases in which it has been held that the Federal Government has a full discretionary power to exclude articles from the mails cannot be used to support, by analogy, a similar power over interstate commerce. For, by the Constitution, Congress is given the exclusive power to establish post-offices or post-roads. The maintenance of a postal service is thus a subject over which the States have no authority. Interstate commerce is, however, a matter which is not established by the Federal Government. Its

regulation, and not its creation, by the Federal Government, is provided for by the Constitution. The distinction between the powers of the United States with reference to interstate commerce and those arising out of its power to establish post-offices and post-roads is recognized in the leading case of *In re* Jackson[9] in which the court say: "We do not think that Congress possesses the power to prevent the transportation in other ways as merchandise of matter which it excludes from the mails. To give efficiency to its regulations and to prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes of articles which legitimately constitute mail matter in the sense in which those laws were used when the Constitution was adopted — consisting of letters and newspapers and pamphlets when not sent as merchandise — but further than this, its powers of prohibition cannot extend."

§ 349. The Federal Employers' Liability Law of 1906.

In 1906 Congress passed an act entitled "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories and Common Carriers Engaged in Commerce between the States and between the States and Foreign Nations to their Employees,"[10] by which act the fellow-servant doctrine of the common law was considerably modified. By the terms of this act "every common carrier in trade or commerce" in the District of Columbia or in the Territories or between the several States was made liable for the death or injury of "any of its employees" which should result from the negligence of "any of its officers, agents, or employees." It thus appears that the provisions of the acts were made applicable to these companies irrespective of the fact whether the person injured or killed was engaged at the time in interstate commerce. The only criterion prescribed was that the employing company was one carrying on commerce among the States. There was thus raised the fundamental question whether the simple fact that a company or corporation is, in any

[9] 96 U. S. 727; 24 L. ed. 877.
[10] 34 Stat. at L. 232.

part of its business, engaged in carrying on interstate commerce renders it subject to federal regulation as to all its activities. There was also raised the question whether the relation between an employing company and its employees is itself a part of the interstate commerce which the company carries on. Both of these questions were discussed in Howard v. Illinois Central R. Co.[11]

The first and more important question the court answered in the negative. "To state the proposition," the court say, "is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters

[11] 207 U. S. 463; 28 Sup. Ct. Rep. 141; 52 L. ed. 297. As to the second question the court said: "We fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce, or within the authority given to use all means appropriate to the exercise of the powers conferred. To illustrate: Take the case of an interstate railway train; that is, a train moving in interstate commerce, and the regulation of which therefore is, in the nature of things, a regulation of such commerce. It cannot be said that because a regulation adopted by Congress as to such train when so engaged in interstate commerce deals with the relation of the master to the servants operating such train or the relations of the servants engaged in such operation between themselves, that it is not a regulation of interstate commerce. This must be, since to admit the authority to regulate such train, and yet to say that all regulations which deal with the relation of master and servants engaged in its operation are invalid for want of power, would be but to concede that power and then to deny it; or, at all events, to recognize and yet render it incomplete."

which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures."

The court then go on to hold the act void as to the States because its application was not limited by its terms to injuries and deaths incurred by persons while engaged at the time in interstate commerce.[12]

§ 350. Employers' Liability Law of 1908.

In order to meet the constitutional objections raised by the Supreme Court to the act of 1906, Congress in 1908 enacted a measure similar to the earlier law except that its provisions are expressly confined to actions growing out of injuries or deaths to persons while actually engaged in the carrying on of interstate commerce.

The constitutionality of this measure has not been passed upon by the Supreme Court. It would appear, however, that its validity is not yet a matter beyond doubt. In the Howard case the court held, as already quoted, that the relation between an interstate carrier and its servants is not necessarily a matter distinct from the interstate commerce which is carried on, and, therefore, beyond the regulative control of Congress; but the court did not hold, and has not yet specifically held that the matter of the liability of such a carrier for accidents accruing to its employees due to the negligence or ill conduct of employers is so directly related to interstate commerce as to bring this liability within the determining power of Congress. Unless this be so the act of 1908, though limited in terms to interstate commerce, must fail.[13]

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[12] The law in a later case was held valid as to the District of Columbia, and inferentially as to the Territories. El Paso & Northeastern Ry. Co. v. Gutierrez, 215 U. S. 87; 30 Sup. Ct. Rep. 21.

[13] It is to be remarked, however, that in Adair v. United States (208 U. S. 161; 28 Sup. Ct. Rep. 277; 52 L. ed. 436) the decision in the Howard case is referred to as sustaining the power of Congress "to prescribe the rule of liability, as between interstate carriers and its employees in such interstate commerce, in cases of personal injuries received by employees while actually engaged in such commerce." It would seem to the author, however, that the language of the Howard case was not quite so specific as this.

merce, and that the power to regulate interstate commerce includes the authority to regulate the instrumentalities by which it is carried on has been repeatedly held by the Supreme Court.[15]

In Johnson v. Southern Pacific R. Co.[16] the Safety Appliance Law was considered and applied without question as to its constitutionality.

In United States v. Colorado & N. W. R. Co.[17] these acts were held applicable to lines of railroad lying wholly within a State, but serving as a link in an interstate route.

§ 352. Federal Eight Hour Law.

By act of 1907, entitled "An Act to Promote the Safety of Employees and Travellers upon Railroads by Limiting the Hours of Service of Employees Thereon" Congress has undertaken to determine the number of hours a day which employees upon interstate railways may be permitted or required to labor. This measure relates to the contract between the employing companies and their employees and thus falls in the same category as the Employers' Liability Act. Its relation to safe and efficient service would, however, seem to be somewhat more direct than the latter act.

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[15] "Commerce, in its simplest signification, means an exchange of goods; but, in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities and enter into commerce; the subject, the vehicle, the agent, and their various operations become the objects of commercial regulations." Justice Johnson in Gibbons v. Ogden, 9 Wh. 1; 6 L. ed. 23.

"It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on." Sherlock v. Alling, 93 U. S. 99; 23 L. ed. 819.

"The power . . . embraces within its control all instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged." Gloucester Ferry Co. v. Pa., 114 U. S. 196; 5 Sup. Ct. Rep. 826; 29 L. ed. 158. The Safety Appliance Acts also meet the test suggested by Cooke.

[16] 196 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. ed. 363.

[17] 157 Fed. Rep. 321.

§ 353. Trades Unions and Interstate Commerce; Federal Legislation with Reference to.

By an act of October 1, 1888, later repealed and replaced by that of June 1, 1898, Congress has made provision for the arbitration of disputes between interstate carriers and their employees. The three arbitrators are selected, one by the company, one by the labor union to which the employees directly interested belong, and the third by these two, and are given power to take testimony, summon witnesses, administer oaths, compel the production of papers, etc. Section 3 provides that the testimony and the award of the arbitrators, when filed in the circuit court for the district in which the controversy arises, shall be final and conclusive on both parties unless set aside for error of law apparent on the record, but that no employee shall be compelled to render personal services without his consent.

Section 10 declares, *inter alia,* that it shall be a misdemeanor for employer or agent to require of an employee, as a condition of employment, that he will not become or remain a member of a trade union, or threaten him with loss of employment if he becomes or remains a member.[18]

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[18] Section 10: "That any employer subject to the provisions of this act, and any officer, agent, or receiver of such employer, who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation, association, or organization; or who shall require any employee or any person seeking employment, as a condition of such employment, to enter into a contract whereby such applicant for employment shall agree to contribute to any fund for charitable, social, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employer's contribution to such fund; or who shall, after having discharged an employee attempt or conspire to prevent such employee from obtaining employment, or who shall, after the quitting of an employee, attempt or conspire to prevent such employee from obtaining employment, is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

The resort to this arbitral board may be had only with the consent of both employer and employees.

Though still upon the statute book no use of its arbitral provisions has yet been made. Inasmuch as personal service may not be enforced the provision that employees may not, during a period of three months after arbitration, quit their employment without giving thirty days' notice, is, of course, without value. It is possible also that the courts will find a constitutional objection to extending their aid to the arbitrators for the compelling of testimony or the production of papers.[19]

The aim of Section 10 is to prevent the blacklisting of employees, to make unlawful the requirement by the employer of an agreement on the part of his employees to release him from liability for injuries, and in general to protect the labor organizations. The constitutionality of this section was denied in several cases in the lower federal courts,[20] and, finally, the same position was assumed by the Supreme Court in Adair v. United States,[21] decided in 1908.

In this case Adair, an agent of a railway company engaged in interstate commerce, was charged with having, in violation of the tenth section of the Act of 1898, dismissed from the service of the company an employee because of his membership in a labor organization. Adair set up the unconstitutionality of this section on the double ground that it was a violation of the Fifth Amendment, being a deprivation of liberty without due process of law; and that is was not justified by the Commerce Clause, and, therefore, void as relating to matters, the regulation of which is reserved exclusively to the States. Both of these contentions were held

[19] See opinion of Justice Field in Pacific Railway Commission Case, 32 Fed. Rep. 241. But see also Interstate Commerce Com. v. Brimson, 154 U. S. 447; 14 Sup. Ct. Rep. 1125; 38 L. ed. 1047.

[20] United States v. Scott, 148 Fed. Rep. 431; R. R. Telegraphers v. Louisville & N. Ry. Co., 148 Fed. Rep. 437, the court in the first case declaring that "Section 10 of the act of June 1, 1898, is not, in a constitutional sense, a regulation of commerce, or of commercial intercourse among the States, and cannot justly or fairly be so construed or treated, inasmuch as its essential object manifestly is only to regulate certain phases of the right of an employer to choose his own servants, whether the duties of those servants when employed relate to interstate commerce or not."

[21] 208 U. S. 161; 28 Sup. Ct. Rep. 277;; 52 L. ed. 436.

[illegible] the latter of these points, the [illegible] possible legal or logical connec- [illegible] membership in a labor organization [illegible] interstate commerce. It cannot be as- [illegible] that the fitness or diligence of the [illegible] determined by such membership. As to [illegible] the provisions of the act with reference [illegible] expressed.[2]

[illegible] Regulation of Interstate Railroad Rates.

[illegible] either to the [illegible] places or ship- [illegible] charges for service. [illegible] intervention to [illegible] companies, or it [illegible] by the [illegible] reasonable and

[illegible] interstate transportation the Federal Gov- [illegible] of these powers of rate regula- [illegible] question. The constitu- [illegible] through a commission as its [illegible] interstate commerce rates that shall be charged [illegible] whether they are so excessive [illegible] and, therefore, in violation of the Fifth [illegible] has not been passed upon by the Supreme Court, [illegible] that the Federal Government has as plenary [illegible] interstate commerce as have the States over inter- [illegible] the long line of decisions upholding the rate fixing [illegible] States with reference to their domestic traffic [illegible] be very persuasive when the Supreme Court is [illegible] determine the rate-making powers of the federal [illegible]

[illegible] McKenna and Holmes filed dissenting opinions.

[illegible] speeches of Senator Foraker delivered in the United [illegible] and Feb. 28 and Apr. 12, 1906. Senator Foraker's [illegible] that the power of the States to fix rates, being based on the control

§ 355. The Right of Congress to Delegate its Rate-Making Power to a Commission.

That a legislature may delegate to a commission as its agent the application to specific cases of a rule legislatively declared, is established.[24] There would thus seem to be no constitutional difficulty in Congress laying down certain principles of railway rate regulation, and intrusting to a commission or other administrative body the task of determining the rates which conform to these requirements. If, therefore, it be desired that interstate railway rates shall be fixed by federal authority, it is clear that it is not necessary that Congress should itself determine each specific rate. Congress must, however, lay down the rule or rules by which the body to which this function is delegated shall be guided.[25]

By the act of June 29, 1906, it is declared by Congress that "charges for interstate transportation of passengers as property shall be just and reasonable;" and to the Interstate Commerce Commission is given the authority, after having decided that a rate in force is not a proper one, "to determine and prescribe what will be the just and reasonable rate or rates, charge or charges to be thereafter observed in such case as the maximum to be charged." Thus the only rule for determining the rates which Congress has declared for the guidance of the Commission in the fixing of specific rates is that they shall be just and reasonable. The determination of when these very general requirements are met by a rate is left in each case, to the judgment of the Commission. It is certainly open to question whether Congress has not in fact really delegated to the Commission the legislative

which they have over corporations chartered by them or permitted to do business within their borders, furnishes no argument to sustain the federal rate-making power except as to corporations chartered by the United States, is without force, for the States in fact are recognized to derive their rate-making power not solely from this source but from the common-law principle that all public services are subject to governmental regulation, as regards the reasonableness of their charges, etc.

[24] See Chapter LXV.

[25] *Cf.* Reeder, *Rate Regulation as Affected by the Distribution of Governmental Power in the Constitution.* See also *post*, Chapter LXIII.

function of fixing rates according to its own judgment and not according to principles legislatively determined. If this has been done, this provision of the law will be held void.

The constitutional principles involved in the power of the courts to review decisions of the Interstate Commerce Commission is considered in the chapter entitled "The Conclusiveness of Administrative Decisions," and also in connection with Due Process of Law.

§ 356. The Federal Anti-Trust Act.[26]

By the Interstate Commerce Act of 1887 interstate railroads are forbidden to form combinations or "pools" for the maintenance of rates, whether for freight or passenger traffic. By the act of July 2, 1890, entitled "An Act to Protect Commerce Against Unlawful Restraints and Monopolies," a general prohibition is laid upon "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations." In United States v. Trans-Missouri Freight Association[27] the railroads are held to be included within this general prohibition.

Based upon alleged violations of this act of 1890 a series of suits have been brought and have received final adjudication by the Supreme Court. For the decision of these cases the court has found it necessary to consider more carefully than in any other set of cases the question what constitutes interstate commerce, and what, therefore, are the limits of the federal regulative power under the Commerce Clause. Thus, though it cannot be said that these cases have necessitated the enunciation of constitutional doctrines not elsewhere stated, or already considered in this treatise, they have resulted in specific adjudications which serve to set in the clearest light the extent and limits of the federal commercial power. For this reason it is advisable to consider these cases *seriatim*.

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[26] In this section only those portions of the act, and those judicial decisions arising thereunder, are considered which have given rise to constitutional questions.

[27] 166 U. S. 290; 17 Sup. Ct. Rep. 540; 41 L. ed. 1007.

§ 357. In Re Greene.

In *Re* Greene,[28] a case involving the status of the Distilling and Cattle Feeding Company, which controlled 95 per cent. of distilled liquors in the United States, the court held that the mere magnitude of an interstate business did not bring it within the prohibition of the Anti-Trust Act.[29]

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[28] 52 Fed. Rep. 104.

[29] "It is very certain that Congress could not, and did not, by this enactment, attempt to prescribe limits to the acquisition, either by the private citizen or state corporation, of property which might become the subject of interstate commerce, or declare that when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the States, a criminal offense was committed by such owner or owners. All persons, individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale or exchange of articles, or the production and manufacture of commodities which form the subjects of commerce will, in a popular sense, 'monopolize' both state and interstate traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged, and developed. But the magnitude of a party's business production, or manufacture, with the incidental and indirect powers thereby acquired and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production or manufacture, is not the 'monopoly' or attempt to 'monopolize,' which the statute condemns." And later: "Congress certainly has not the power or authority under the Commerce Clause, or any other provision of the Constitution to limit and restrict the right of corporations created by the States or the citizens of the States, in the acquisition, control and disposition of property. Neither can Congress regulate the price or prices at which such property or the products thereof, shall be sold by the owner or owners, whether corporations or individuals."

"The Supreme Court of the United States has not defined what a monopoly under this section of the Anti-Trust Law is. I conceive that it is not sufficiently defined by saying that it is the combination of a large part of the plants in the country engaged in the manufacture of a particular product in one corporation. There must be something more than the mere union of capital and plant before the law is violated. There must be some use by the company of the comparatively great size of its capital and plant and extent of its output, either to coerce persons to buy of it rather than of some competitor, or to coerce those who would compete with it to give up their business. There must, in other words, be an element of duress in the conduct of its business toward the customers of the trade and its competitors before mere aggregation of plant becomes an unlawful monopoly." Speech by W. H. Taft, Aug. 19, 1907, at Columbus, Ohio.

§ 358. United States v. E. C. Knight Co.

The first case to reach the Supreme Court was the so-called Sugar Trust Case of United States v. E. C. Knight Co.[30]

In this case it was contended by the Government that the acquisition by the American Sugar Refining Company of the stock of a number of sugar refining corporations of Pennsylvania was with the object and effect of establishing a substantial monopoly of the industry, and that inasmuch as the product was sold throughout the country and distributed among the States, the provision of the act of 1890 with reference to the monopolization or combination or conspiracy to monopolize trade and commerce among the States was violated. The court, however, applying the doctrine of Coe v. Errol[31] and Kidd v. Pearson,[32] held that the act did not, and constitutionally could not, extend to combinations, conspiracies or monopolies relating to the manufacture of commodities, this being a field reserved exclusively to the States. The fact that interstate or foreign trade might be incidentally affected was declared not material.[33]

The doctrine thus laid down by the court has never been departed from, and is, indeed, one from which there would seem to be no logical escape, if the line which divides federal control of interstate commerce from state regulation of local industries and manufacturing is to be maintained. In applying this doctrine, however, the court, in later cases, has shown a somewhat

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[30] 156 U. S. 1; 15 Sup. Ct. Rep. 249; 39 L. ed. 325.

[31] 116 U. S. 517; 6 Sup. Ct. Rep. 475; 29 L. ed. 275.

[32] 128 U. S. 1; 9 Sup. Ct. Rep. 6; 32 L. ed. 346.

[33] "The object [of the combination] was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was not more than to say that trade or commerce served manufacture to fulfil its function. . . . It does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. . . . That trade or commerce might be indirectly affected was not enough to entitle complainants to a decree."

greater readiness to find in the acts complained of, a direct interference with interstate commerce, and, therefore, a ground for the application of the federal statute.

§ 359. United States v. Trans-Missouri Freight Association.

In United States v. Trans-Missouri Freight Association[34] the act was held to apply to railroads, and moreover, that contracts or combinations in restraint of trade were by the act prohibited, whether or not those contracts were in themselves reasonable. In this case a contract between several railway companies was held illegal, and the resulting association, the purpose of which was to maintain rates, and prevent competition over a territory including a number of States, was dissolved.[35]

§ 360. United States v. Joint Traffic Association.

In United States v. Joint Traffic Association[36] the doctrine of the Trans-Missouri Freight Association case was affirmed. In this case the constitutional power of Congress to prohibit all contracts in restraint of interstate trade, whether reasonable or unreasonable, was questioned, and the possible far-reaching effect of the act invalidating business contracts, partnership agreements, urged. As to this the court say that the formation of corporations simply for business or manufacturing purposes has never been regarded as contracts in restraint of trade, and that the same is true as to partnerships. "We are not aware," the opinion continues, "that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade, within any legal definition of that term."[37]

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[34] 166 U. S. 290; 17 Sup. Ct. Rep. 540; 41 L. ed. 1007.

[35] Four justices dissented.

[36] 171 U. S. 505; 19 Sup. Ct. Rep. 25; 43 L. ed. 259.

[37] It is to be observed, however, that in the Trans-Missouri Freight Association case, the technical legal definition of the phrase "restraint of trade" as used in the act of 1890 was repudiated.

portation, nor to any other form of interstate commerce. To hold all such agreements void would, in our judgment, improperly extend the act to matters which are not of an interstate commercial nature."

§ 362. Anderson v. United States.

In Anderson v. United States,[40] decided the same day as the Hopkins case, an association of dealers in live stock, providing by its rules that its members should not transact business with non-members, nor with commission men who should deal with non-members, was held not a combination or conspiracy in restraint of interstate trade, inasmuch as it appeared that membership was open to all dealers, and no attempt was made to control prices or the number of cattle bought nor in any way to prevent full competition between the members. In this case the ground taken by the court was not so much that the combination did not relate to interstate commerce, as that there was no restraint upon commerce imposed by its rules, nor an attempt to monopolize such commerce.

§ 363. Addyston Pipe & Steel Co. v. United States.

In a series of cases, beginning with Addyston Pipe & Steel Co. v. United States,[41] the court has shown that combinations or agreements between manufacturers or dealers do not come within the protection of the doctrine of the Knight case if it appear that the attempt is made in any way directly to control or change what would normally be the course of interstate commerce in the absence of such combinations or agreements.

In the Addyston case six companies, engaged in the manufacture and sale of iron pipe, had formed a combination whereby competition in the sale of pipe throughout the United States was practically destroyed. In the exercise of the power thus possessed, the combination had allotted to its several member companies the territory within which each should have the exclusive right to sell

[40] 171 U. S. 604; 19 Sup. Ct. Rep. 50; 43 L. ed. 300.
[41] 175 U. S. 211; 20 Sup. Ct. Rep. 96; 44 L. ed. 136.

its products. By a unanimous opinion the court held the agreement to come within the prohibition of the act of 1890. Distinguishing this combination from that in the Knight case, the court say: "The direct purpose of the combination in the Knight case was the control of the manufacture of sugar. There was no combination or agreement in terms regarding the future disposition of the manufactured article; nothing looked to a transaction in the nature of interstate commerce." As to the Addyston combination, the court say: "The direct and immediate result of the combination was . . . necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the State in which they were made. The defendants, by reason of this combination and agreement, could only send their goods out of the State in which they were manufactured for sale and delivery in another State, upon terms and pursuant to the provisions of such combination."

§ 363. Montague v. Lowry.

In Montague v. Lowry[42] was held illegal as a restraint of interstate commerce an association of dealers in the State of California and manufacturers in other States, with the purpose of controlling the sale of their product in California. Here there was no allotment of territory as in the Addyston case, and, except as to the provision of the agreement that the non-resident manufacturers should sell their product only to the members of the association in California, no interstate transactions were regulated. This provision, however, it was held, rendered the entire combination in violation of the act of 1890. "It was not a combination or monopoly among manufacturers simply but one between them and dealers in the manufactured article of commerce between the States."

§ 364. Northern Securities Case.

In the so-called Merger Case — Northern Securities Co. v. United States[43] — the act of 1890 was held applicable to a combination of stockholders in the competing interstate railway com-

[42] 193 U. S. 38; 24 Sup. Ct. Rep. 307; 48 L. ed. 608.
[43] 193 U. S. 197; 24 Sup. Ct. Rep. 436; 48 L. ed. 679.

panies, the aim, or at least the effect of which was to prevent or render possible the prevention of competition between the two roads by transferring their stock to a single holding company, organized under the laws of a State, which holding company thereby became possessed of a controlling interest in the stock of each of the railway companies.

In this case it was strenuously urged that the combination or agreement represented by the holding company was one which, in itself, had no direct relation to interstate commerce, the company being an investment company and not itself a carrier company; and that the question thus reduced itself to whether the United States had, under its commercial power, the constitutional authority to regulate the transference and holding of the shares of stock of state corporations.[44]

To this argument the court replied that the real question at issue was not as to the power of the United States to regulate the holding of stock of state corporations, but as to the power of state corporations to restrain or monopolize interstate commerce. It was admitted that contracts or combinations relating to the holding of stock of interstate carrier companies have not, generally speaking, a direct relation to interstate commerce, and therefore, that, as to them, the doctrine of the Knight case would apply. But in the present case the court found that the Merger Company was not a *bona fide* investment company, but was, in its very inception and sole design, a scheme for controlling interstate commerce. Its relation to interstate commerce was thus a direct one. The court say: "The government . . . does not contend that Congress may control the mere acquisition or the mere ownership of stock in a state corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful, and not prohibited by the Constitution. It does contend that no state

[44] Other objections were urged which it is not necessary here to consider.

corporation can stand in the way of the enforcement of the national will, legally expressed. . . . The federal court may not have the power to forfeit the charter of the Securities Company, it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish nor increase its capital stock. All these and like matters are to be regulated by the State which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce."

By its decree the court thereupon enjoined the company from acquiring aditional stock, from voting that which it had already acquired, and from exercising any control over the roads, the stock of which it held.[45]

In result, the chief significance of the Merger case would seem to be the authority assumed by the court to look beneath the surface of acts, and, irrespective of their formal character, to hold them subject to the provisions of the Anti-Trust Act, if, thus viewed, they disclose a plan to restrain, or a capability of restraining, interstate trade.

§ 365. Beef Trust Case.

The so-called Beef Trust Case — Swift & Co. v. United States[46] — decided in 1905, added no new principle to the law of inter-

[45] Justice Brewer, while concurring in the judgment, dissented from some of the language of the majority justices. In his opinion the prohibition of the act of 1890 should be restricted to contracts in unreasonable restraint of trade.

Justice White in a dissenting opinion argued that, despite the disclaimer of the majority, the court was upholding the power of the United States to regulate the acquisition and holding of the property of state corporations.

Justice Holmes in a dissenting opinion argued that the act was a criminal statute and should, therefore, receive a strict construction, and, so construed, that its prohibitions should be restricted to contracts and combinations in restraint of trade which are illegal by the common law, namely, those contracts with a stranger whereby the contractor restrains his own freedom of trading, and those combinations formed with the purpose of excluding strangers to the combination from engaging in the business.

[46] 196 U. S. 375; 25 Sup. Ct. Rep. 276; 49 L. ed. 518.

state commerce. The act of 1890 was held to have been violated by a combination of independent meat dealers in an attempt to monopolize commerce in fresh meat among the States, and to restrict the competition of their respective buyers when purchasing stock for them in the stock yards. It is significant, however, that the court emphasized that the unlawfulness of the general scheme was sufficient to render unlawful the constituent acts, which in themselves, and apart from their place in the general scheme, might not have been in violation of the Anti-Trust Act. "The plan may make the parts unlawful." [47]

In Cincinnati, etc., Co. v. Bay[48] the court, applying the principle *de minimis non curat lex,* held that where the restraint complained of is insignificant, even though direct, a contract will not be held void as in violation of the Anti-Trust Act.

§ 366. Danbury Hatters' Case.

In Loewe v. Lawler[49] the court took a very advanced ground as to what will be construed to be an interference with interstate commerce. In this case the act of 1890 was held to have been violated by a combination of members of a labor organization, in the nature of a boycott, to prevent the manufacture of hats intended for transportation beyond the State, and to prevent their vendees in other States from reselling the hats, and from further negotiating with the manufacturers for further purchases.

[47] As regards the bearing of the combination upon interstate commerce, the court say: "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another State from that of the seller and of the cattle. And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated."

[48] 200 U. S. 179; 26 Sup. Ct. Rep. 208; 50 L. ed. 428.

[49] 208 U. S. 274; 28 Sup. Ct. Rep. 301; 52 L. ed. 488.

It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed."

§ 367. Other Cases.

In Shawnee Compress Co. v. Anderson[53] it was held that while a company may, in connection with the sale of its business and good-will, covenant not to re-enter the business for a time or within a territory sufficiently broad to protect the vendee, a covenant so made is in violation of the act of 1890 if it be executed in pursuance of a plan to assemble under one management or ownership a business extending over two or more States.

In Connolly v. Union Sewer Pipe Co.[54] the plaintiff in error defended a suit upon certain promissory notes upon the ground that the company to which they were given was at the time in combination with other companies in violation of the Anti-Trust Act. The defense was overruled by the Supreme Court on the ground that the suit was not an action on the part of the company to enforce obligations directly growing out of an illegal combination. "The purchases by the defendants [plaintiffs in error] had no necessary or direct connection with the alleged illegal combination, for the contracts between the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the latter became an illegal combination."

In Continental Wall Paper Co. v. Voight[55] the case was distinguished from the Connolly case, the court holding that a recovery upon an account for goods sold and delivered by a corporation created as a means for bringing about a combination of wall paper manufacturers in violation of the act of 1890, could not be had, where, to the knowledge of both parties, the account had a direct reference to and was in execution of the agreements constituting the illegal combination.

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[53] 209 U. S. 423; 28 Sup. Ct. Rep. 572; 52 L. ed. 865.
[54] 184 U. S. 540; 22 Sup. Ct. Rep. 431; 46 L. ed. 679.
[55] 212 U. S. 515; 29 Sup. Ct. Rep. 280; 53 L. ed. 486.

In this case it was admitted by the demurrer that the plaintiff was the selling agent of a combination of wall paper manufacturers and that the defendants were virtually compelled to sign a jobbers agreement which bound them to buy from the plaintiff at fixed prices the paper needed by them, and not to sell the same at lower prices or upon better terms than these or upon which the plaintiff sold to dealers other than jobbers.[56]

§ 368. The Commodities Clause of the Hepburn Act of 1906.

By section 1 of the so-called Hepburn Railway Rate Act of 1906 it is provided that "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article of commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." [57]

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[56] The court quote with approval the following language of the lower court: "The conspiring mills were situated in many States. The consumers [of wall paper] embraced the whole citizenship of the United States. The jobbers and wholesalers, who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company or be driven out of business, were in every State. Before the combination each of the combining companies was engaged in both state and interstate commerce. The freedom of each, with respect to prices and terms, was restrained by the agreement, and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete scheme to accomplish the stifling of competition. But none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details. None of the schemes with which this may be compared is more certain in results, more widespread in its operation, and more evil in its purposes. It must fall within the definition of 'a restraint of trade,' whether we confine ourselves to the common-law interpretation of that term, or apply that given to the term as used in the federal act."

[57] U. S. Stat. at L. 585.

The constitutionality of this "Commodities Clause" was sustained by the Supreme Court in United States v. Delaware & H. Co., decided May 3, 1909.[57a] The objections that it was in violation of the Fifth Amendment to the Constitution and that it attempted the regulation of a matter not directly concerned with interstate commerce were overruled. It was, however, declared that the ownership by a railway carrier of stock in *bona fide* corporations manufacturing, producing or owning the commodity carried, is not the "interest direct or indirect" in such commodity, forbidden by the Hepburn Act.

§ 369. Federal Control of Corporations Under the Commerce Clause.

The Federal Government has the undoubted power itself to own and operate, or to incorporate companies for the construction and operation of roads, bridges, and other instrumentalities of interstate commerce.[58] This authority is derived not only from the Commerce Clause but from the authority of the Federal Government to establish post-offices and post-roads, and from its military powers. And, incidental to the exercise of these powers, the right of eminent domain may be exercised by the Federal Government or by corporations chartered by it, within the States and Territories.[59]

In California v. Central Pacific Ry. Co.[60] the court, after reviewing legislative and judicial precedents, say: "It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for the postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct national highways and bridges from State to State, is essential to the complete control

[57a] 213 U. S. 366; 29 Sup. Ct. Rep. 527; 53 L. ed. 836.

[58] California v. Central Pacific Ry. Co., 127 U. S. 1; 8 Sup. Ct. Rep. 1073; 32 L. ed. 150; Monongahela Navigation Co. v. United States, 148 U. S. 312; 13 Sup. Ct. Rep. 622; 37 L. ed. 463; Luxton v. North River Bridge Co., 153 U. S. 525; 14 Sup. Ct. Rep. 891; 38 L. ed. 808.

[59] Kohl v. United States, 91 U. S. 367; 23 L. ed. 449.

[60] 127 U. S. 1; 8 Sup. Ct. Rep. 1073; 32 L. ed. 150.

and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce." This language is quoted with approval in Luxton v. North River Bridge Co.[61]

In Wilson v. Shaw[62] the authority of the United States to construct the interoceanic canal across the territory ceded by the Republic of Panama, is declared.

§ 370. Power of the Federal Government to Charter Companies to Do a Manufacturing Business Within the States.

It has been argued that the Federal Government has the constitutional power to charter companies not only to do an interstate carrier business, but, as incidental thereto, to manufacture and produce the goods which they transport. Some support for the doctrine is claimed from the cases in which it has been held that the National Banks chartered primarily to serve a federal function, may also be authorized, as incidental thereto, to do a general banking business within the States. But it is by no means sure that these bank cases will be held to furnish this support. In the case of the National Banks it will be remembered that it was held that it was not practicable for them to exist as banks and to perform the federal functions which they were created to perform, unless, at the same time, they were permitted to do a general banking business. As to interstate carrier companies, however, it would seem that there is not the same necessity that they should be permitted to carry on a manufacturing business. Indeed, by the federal Hepburn Act of 1906, interstate railways are expressly forbidden to have a direct or indirect interest in the commodities which they transport.

It would seem, however, that federally incorporated interstate carrier companies may be authorized to carry on also an intrastate carrier business. Here the connection between the two would seem to be as close as that between the general banking business and the purely federal functions of the National Banks.

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[61] 153 U. S. 525; 14 Sup. Ct. Rep. 891; 38 L. ed. 808.

[62] 204 U. S. 24; 27 Sup. Ct. Rep. 233; 51 L. ed. 351.

It was argued by Mr. Garfield, when Commissioner of Corporations, that Congress may grant charters to manufacturing companies whose only connection with interstate commerce would be that their products would become articles of interstate commerce, the reasoning being that though, as established by the Knight case, the production of goods intended for interstate commerce, has no direct connection with and does not imply interstate commerce, it does not follow that interstate commerce does not imply production. "On the contrary, it is submitted," declares Commissioner Garfield, "that it does imply production to such an extent that the power to produce is a necessary constitutional incident of the powers of such proposed interstate commerce corporations. Production is an indispensable prerequisite of commerce, whether interstate or otherwise. Production may exist without commerce, certainly without a specified form of commerce, such as interstate commerce. . . . On the other hand interstate commerce cannot exist without production. . . . All the powers for the transaction of commerce might be granted by federal franchise, and yet they would be wholly null, valueless, and inoperative unless there were also means of bringing into existence the subjects upon which such powers shall act." This being taken as established, Mr. Garfield has no difficulty in declaring that the States would be without the constitutional power to prohibit or interfere with production by such companies.

Certainly the reasoning here is by no means convincing. Upon the same ground it might be argued that because paper and ink, pencils and pens, are necessary for the writing of letters, and letters are necessary if there is to be first-class mail matter, the Federal Government may control the manufacture of paper and ink, pencils and pens. And by a similar argument the authority of the Federal Government could be extended over the entire manufacturing and industrial interests of the country.

The case of the National Banks furnishes no support whatever for Mr. Garfield's position. The efficiency of interstate carrier companies, as transportation agencies, is wholly independent of the conditions under which, or the persons or corporations by

which, the goods which they carry are produced. Of course, if no goods are produced there will be no interstate transportation. But this will be so because there will be no need for such transportation. Goods are not produced in order that commerce may exist. Commerce, in short, is not an end in itself.

According to Mr. Garfield's argument which treats commerce as an end in itself it might be argued that the production of commodities should be increased not so that a need for them as articles of consumption could be satisfied, but simply and solely to supply larger train-loads for the interstate carrier companies. The absurdity of this is manifest.

§ 371. Federal Permission to State Manufacturing Companies to Engage in Interstate Commerce.

The denial to Congress of the power to charter companies empowered to do a manufacturing business within the States does not carry with it the denial of a power to require of individuals or of state-chartered companies a federal permission to engage in interstate commerce whether as carriers or as shippers of goods across state borders. The right to engage in interstate commerce or to make use of interstate commercial instrumentalities is a federal right, and, it would seem, the plenitude of control which the Constitution grants to Congress with respect to the regulation of this right carries with it the authority to attach such conditions to its enjoyment as may be found fit. The case of Champion v. Ames has illustrated the extent of this federal power to exclude commodities from interstate trade. Thus while Congress may not be able to charter manufacturing companies, which the States may not exclude from their borders, it may refuse to individuals or state-chartered concerns the right to ship their products across state lines except upon certain conditions, which conditions may be so stated as to bring the companies and the individuals, so far as they make use of interstate commerce agencies, within a rigorous federal control.[63]

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[63] *Cf.* Veazie Bank v. Fenno, 8 Wall. 533; 19 L. ed. 482; United States v. Marigold, 9 How. 560; 13 L. ed. 257; United States v. Joint Traffic Association, 171 U. S. 505; 19 Sup. Ct. Rep. 25; 43 L. ed. 259; Champion v. Ames, 188 U. S. 321; 23 Sup. Ct. Rep. 321; 47 L. ed. 492.

§ 372. Federal Taxing Power and Interstate Commerce.

A federal tax may be laid upon interstate commerce, its instrumentalities, the articles carried, or the privilege of engaging in it, either as a revenue measure or as a means of regulation. If the tax should be laid for a regulative purpose, its constitutionality would be dependent wholly upon the Commerce Clause, and, not being, except in form, a tax, would not be subject to the express limitations as to apportionment, etc., imposed by the Constitution upon the exercise of the taxing power by the United States.[64]

A genuine tax imposed for revenue purposes, if assessed upon the commodities of interstate commerce or upon the instrumentalities of commerce as property, would be a direct tax and would have to be apportioned among the States according to their respective populations. That this is so sufficiently appears from the doctrines of Knowlton v. Moore.[65]

If the tax should be one upon the privilege of engaging in, or carrying on interstate commerce, it would in all probability be construed to be constitutionally an indirect tax.[66] The case that would probably be held controlling as to this are Nicol v. Ames[67] in which a stamp act on sales made at an exchange or board of trade was held to be not a direct tax on the property sold, but an indirect tax in the nature of an excise on the facilities offered at the exchanges or boards of trade.[68]

A more doubtful point, however, is whether such an excise tax upon the right to engage in interstate commerce would not come within the constitutional provision that "no tax or duty shall be laid on articles exported from any State." That it would be held to be a tax on exports from a State would seem to follow from the

[64] *Cf.* Veazie Bank v. Fenno, 8 Wall. 533; 19 L. ed. 482.

[65] 178 U. S. 41; 20 Sup. Ct. Rep. 747; 44 L. ed. 969.

[66] Although economically a direct tax.

[67] 173 U. S. 509; 19 Sup. Ct. Rep. 522; 43 L. ed. 786.

[68] See *ante*, p. 618. In Polluck v. Farmers' L. & T. Co. (158 U. S. 601; 15 Sup. Ct. Rep. 912; 39 L. ed. 1108) the court by way of caution say: "We do not mean to say that an act . . . might not lay excise taxes on business, privileges, employments and vocations," without needing to be apportioned.

[illegible]

[illegible] Navigable Waters

[illegible] powers, both [illegible] of Section [illegible] that the fed- [illegible] of admiralty and [illegible] under this grant [illegible] construed to have [illegible] with or occur- [illegible] the United States. These [illegible] all waters, whether [illegible] within a single State or [illegible] of being so [illegible] may be conducted. [illegible] of federal admi- [illegible] the federal authority [illegible] than that derived from [illegible]

[illegible] regulations governing [illegible] the United States," which [illegible] from the navigable [illegible] has not seen fit [illegible] in their ordinary condi- [illegible] highway over [illegible] with other States or for- [illegible] in which such commerce is [illegible]

[illegible] congressional legislation, the [illegible] transportation upon the navigable

[illegible]

waters within their respective borders. In all cases Congress has, of course, authority to supersede the regulations of the States which are considered to operate as an obstruction to navigation.[72]

§ 374. Federal Control of Foreign Commerce.

The same clause which gives to Congress the power to regulate commerce among the States extends the power to commerce with foreign nations. It has been declared that "the power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."[73] This is true, and yet the control which the United States may exercise over foreign commerce is broader than that which it may exercise over interstate commerce for the reason that it is able to draw additional powers from constitutional sources other than the Commerce Clause. Thus, especially from the exclusive and plenary authority over foreign relations, granted to it, the Federal Government is able to control the admission of aliens, to provide for their deportation, to grant special commercial privileges by treaty, and to lay a total or partial embargo upon foreign commerce. In Buttfield v. Stranahan[74] the court also suggest the possibility that the federal authority over interstate commerce may be, in certain directions, limited by the reserved rights of the States, which limitations would not apply to foreign commerce.[75]

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[72] For an excellent statement in detail of the specific powers of the States and of the United States with reference to navigable waters, and the manner in which these powers have been exercised, see Prentice and Egan, *The Commerce Clause*, pp. 95–139.

[73] Brown v. Houston, 114 U. S. 622; 5 Sup. Ct. Rep. 1091; 29 L. ed. 257.

[74] 192 U. S. 470; 24 Sup. Ct. Rep. 349; 48 L. ed. 525.

[75] In this case the court say: "The power to regulate foreign commerce is certainly as efficacious as that to regulate commerce with the Indian tribes. And this last power was referred to in United States v. 43 Gallons of Whiskey (93 U. S. 188; 23 L. ed. 846), as exclusive and absolute, and was declared to be 'as broad and as free from restrictions as that to regulate commerce with foreign nations.' In that case it was held that it was competent for Congress to extend the prohibition against the unlicensed introduction and sale of spirituous liquors in the Indian country to territory in proximity to that occupied by the Indians, thus restricting commerce with them. We entertain

sels bound to, or from, one State, be obliged to enter, clear, or pay duties in another."

This clause has received little judicial construction. One of the few cases in which the meaning of the clause has been considered is Pennsylvania v. W. & B. Bridge Co.[78] In that case it was urged that "the interruption of the navigation of the steamboats engaged in commerce and the conveyance of passengers upon the Ohio River at Wheeling from the erection of the bridge . . . virtually operated to give a preference to that port over that of Pittsburg." The court, however, say: "Conceding all this to be true, a majority of the court are of the opinion that the Act of Congress is not inconsistent with the clause of the Constitution referred to — in other words, that is not giving a preference to the ports of one State over those of another, within the true meaning of that provision. There are many Acts of Congress passed in the exercise of this power to regulate commerce, providing for a special advantage to the port or ports of one State and which very advantage may incidentally operate to the prejudice of the ports in a neighboring State, which have never been supposed to conflict with this limitation upon its power. The improvement of rivers and harbors, the erection of lighthouses, and other facilities of commerce, may be referred to as examples. It will not do to say that the exercise of an admitted power of Congress conferred by the Constitution is to be withheld, if it appears, or can be shown, that the effect of the operation of the law may incidentally extend beyond the limitation of the power. Upon any such interpretation, the principal object of the framers of the instrument would be sacrificed to the subordinate consequences resulting from its exercise. These consequences and incidents are very proper considerations to be urged upon Congress for the purpose of dissuading that body from its exercise, but afford no ground for denying the power itself, or the right to exercise it. . . . The power to establish their ports of entry and clearance by the States was given up, and left to Congress. But the rights of the States were secured, by the exemption of the vessels from

[78] 18 Wall. 421; 15 L. ed. 435.

the necessity of entering or paying duties in the ports of any State other than that to which they were bound, or to obtain a clearance from any port other than at the home port, or that from which they sailed. And also by the provision that no preference should be given, by any regulation of commerce or revenue, to the ports of one State over those of another. So far as the regulation of revenue is concerned, the prohibition in the clause does not seem to have been very important, as, in a previous section (8), it was declared that 'all duties, imposts, and excises, shall be uniform throughout the United States;' and as to a preference by a regulation of commerce, the history of the provision, as well as its language, looks to a prohibition granting privileges or immunities to vessels entering or clearing from the ports of one State over those of another. That these privileges or immunities, whatever they may be in the judgment of Congress, shall be common and equal in all the ports of the several States. Thus much is undoubtedly embraced in the prohibition; and it may, certainly, also embrace any other description of legislation looking to a direct privilege or preference of the ports of any particular State over those of another. Indeed the clause, in terms, seems to import a prohibition against some positive legislation by Congress to this effect, and not against any incidental advantages that might possibly result from the legislation of Congress upon other subjects connected with commerce, and confessedly within its power. Besides, it is a mistake to assume that Congress is forbidden to give a preference to a port in one State over a port in another. Such preference is given in every instance where it makes a port in one State a port of entry and refuses to make another port in another State a port of entry. No greater preference, in one sense, can be more directly given than in this way; and yet the power of Congress to give such preference has never been questioned. Nor can it be without asserting that the moment Congress makes a port in one State a port of entry, it is bound, at the same time, to make all other ports in all other States ports of entry. The truth seems to be that what is forbidden is, not discrimination between individual ports within the same or different States, but discrimination between States."

The foregoing *dicta,* if accepted by the courts, would seem to dispose of the argument which has by some been made that, under the Hepburn Rate Act it will not be constitutionally possible for Congress, or its agent, the Interstate Commerce Commission, to grant differentials to different cities.

§ 375. Commerce with the Territories and with the District of Columbia.

The Commerce Clause contains no reference to trade between the States and the Territories or the District of Columbia, or the Territories *inter se.* In general, however, the courts have treated the District of Columbia and the Territories as "States" within the meaning of the Clause.[79]

Congress having exclusive jurisdiction within and over the District and the Territories, there of course cannot arise, as to them, the objection that federal regulations extend to matters that are of domestic concern.

§ 376. Commerce with Indians.

So long as the Indians form distinct communities occupying clearly defined territories, even though those territories be within the borders of the States, intercourse with them is a matter subject to federal regulation,[80] and this federal power of regulation extends to the prohibition of sales to Indians within a State and beyond the borders of the Indian Reservation.[81] The federal control of commerce with the Indians, given by the Commerce Clause, is thus seen to be supplemented by the general jurisdiction of the National Government over Indians as wards of the Nation.[82]

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[79] Hanley v. Kansas City S. Ry. Co., 187 U. S. 617; 23 Sup. Ct. Rep. 214; 47 L. ed. 333; Stoutenburgh v. Hennick, 129 U. S. 141; 9 Sup. Ct. Rep. 256; 32 L. ed. 637. These cases do not, however, squarely decide this point. *Cf. Michigan Law Review,* II, 468.

[80] United States v. Kagama, 118 U. S. 375; 6 Sup. Ct. Rep. 1109; 30 L. ed. 228; United States v. Holliday, 3 Wall. 407; 18 L. ed. 182.

[81] United States v. Holliday, 3 Wall. 407; 18 L. ed. 182.

[82] See Chapter XX for a more detailed treatment of this subject.

CHAPTER XLIV.

OTHER POWERS OF CONGRESS.

NATURALIZATION.

§ 377. Naturalization.

Clause 4 of Section VIII of Article I of the Constitution gives to Congress the power to establish "an uniform rule of naturalization."

This power has already been considered in an earlier chapter dealing with citizenship, and it is here necessary to add only that the power, though in an early and ill considered case held to be one that may be concurrently exercised by the States,[1] was in Chirac v. Chirac,[2] decided in 1817, held to be exclusively in Congress and this doctrine has not since been questioned.

BANKRUPTCY.

§ 378. Bankruptcy: Definition of.

The same clause which gives to Congress the power to establish an uniform rule of naturalization, authorizes that body to establish "uniform laws on the subject of bankruptcies throughout the United States."

The construction which has been given to this clause furnishes one of the few exceptions to the general rule that the technical terms of the Constitution are to be given the meanings which they had at the time the Constitution was adopted. In 1789 "bankruptcy" and "insolvency" had, in the English law, different and distinct meanings. Bankruptcy applied only to merchants or traders charged with having committed some fraudulent or *quasi*-fraudulent act upon their creditors, who thereupon might institute proceedings to have their debtor declared a bankrupt, his property taken and distributed in payment of his debts, and he him-

[1] Collet v. Collet, 2 Dall. 294; 1 L. ed. 387.

[2] 2 Wh. 259; 4 L. ed. 234.

self either discharged from further liability therefor, or imprisoned as the court might think fit. Insolvency, upon the other hand, described the status of a debtor, not a trader, who, in order to obtain a discharge might in certain cases surrender, or offer to surrender, all his property in payment of his debts.

In this country, however, from the beginning Congress and the Supreme Court have given to the term "Bankruptcy" a meaning broad enough to cover "Insolvency" as well. Indeed no distinction between the two was recognized in the colonies before the separation from England.[3]

By various acts Congress has, from time to time, enacted laws providing for both voluntary and involuntary bankruptcy, that is, for proceedings instituted by the debtor himself or *in invitum* by his creditors. The details of this legislation need not be here given. It is sufficient to say that the first law was enacted in 1800, and repealed in 1803; the second law in 1841 and repealed in 1843; the third in 1867, and after being several times amended, repealed in 1878; the fourth law, now in force, being passed July 1, 1898.

§ 379. Federal Power not Exclusive.

In Sturges v. Crowninshield,[4] affirmed in Ogden v. Saunders,[5] the court held that the power to establish bankruptcy laws is not exclusively vested in Congress, but may be exercised by the States in the absence of federal legislation.

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[3] Story, *Commentaries*, Ch. VI. In Sturges v. Crowninshield (4 Wh. 122; 4 L. ed. 529), Marshall says: "The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say who must be excluded from, or may be included within, this description. It is, like every other part of the subject, one to which the legislature may exercise an extensive discretion. This difficulty of discriminating with any accuracy between insolvent and bankrupt laws would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law." See Hanover National Bank v. Moyses (186 U. S. 181; 22 Sup. Ct. Rep. 857; 46 L. ed. 1113), in which the authorities on this point are reviewed.

[4] 4 Wh. 122; 4 L. ed. 529.

[5] 12 Wh. 213; 6 L. ed. 606.

§ 380. State Bankruptcy Laws and the Obligation of Contracts.

The right of the States, in the absence of conflicting congressional legislation, to enact bankruptcy laws is limited by the provision of the Constitution that no State shall pass any law impairing the obligation of contracts. Indeed, if we are to accept the statement of the court in Hanover v. Moyses[6] this prohibition was made for this express purpose.[7]

In Sturges v. Crowninshield the court held invalid a state law which discharged the debtor from a contract entered into previous to its passage.

In Ogden v. Saunders the court held valid a state bankruptcy law which discharged the debtor and his future acquisitions of property so far as it related to debts contracted subsequent to the passage of the law. The law was thus, in effect, read into each contract as a clause thereof.[8]

The authority of the States to deal by bankruptcy or other laws with contracts entered into subsequent to their enactment is plenary. "The inhibition of the Constitution [as to the impairment of contracts] is wholly prospective. The States may legislate as to contracts thereafter made, as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effect."[9] Thus the States have been permitted to exempt at will from execution, or from attachment and distribution under bankruptcy proceedings, such classes and amounts of the debtor's property as they may see fit.[10]

§ 381. State Laws Have no Extraterritorial Force.

In Ogden v. Saunders was laid down the important principle that a certificate of discharge under a state law cannot be pleaded

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[6] 186 U. S. 181; 22 Sup. Ct. Rep. 857; 46 L. ed. 1113.

[7] The court say: "As the States, in surrendering the power, did so only if Congress chose to exercise it, but in the absence of congressional legislation retained it, the limitation was imposed on the States that they should pass no 'law impairing the obligation of contracts.'"

[8] Chief Justice Marshall and Justices Story and Duvall dissenting.

[9] Edwards v. Kearzey, 96 U. S. 595; 24 L. ed. 793.

[10] See, for example, Denny v. Bennett, 128 U. S. 489; 9 Sup. Ct. Rep. 134; 32 L. ed. 491.

in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained. The creditor of another State is, however, concluded by the discharge in bankruptcy if, by appearance or otherwise, he has made himself a party to the original insolvency proceedings.

It is thus seen that the power of the States in the matter of bankruptcy does not extend to an absolute release of the debtor from the obligation of his contracts. "The authority to deal with the property of the debtor within the State, so far as it does not impair the obligation of contracts, is conceded; but the power to release him, which is one of the usual elements of all bankrupt laws, does not belong to the legislature where the creditor is not within the control of the court." [11]

The United States is, of course, not under this territorial limitation in the exercise of its bankruptcy powers, and furthermore, it is not limited with reference to the impairment of the obligation of contracts. National bankrupt laws may, therefore, be made applicable to contracts already entered into at the time of their passage.[12]

§ 382. Uniformity.

It is, however, required of national bankrupt laws that they shall be uniform. The uniformity is a geographical one. The laws must, in all their provisions, be equally applicable to all of the States, and to incorporated territories.[13]

By Section 6 of the act of 1898 it is provided that: "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition." A somewhat similar

[11] Denny v. Bennett, 128 U. S. 489; 9 Sup. Ct. Rep. 134; 32 L. ed. 491. See also Brown v. Smart, 145 U. S. 454; 12 Sup. Ct. Rep. 958; 36 L. ed. 773.

[12] *In re* Klein, 1 How. 277 note; Hanover Nat. Bank v. Moyses, 186 U. S. 181; 22 Sup. Ct. Rep. 857; 46 L. ed. 1113.

[13] *Quære* as to unincorporated territories.

provision appeared in the act of 1867. These exemptions, the character and amount of which are thus made dependent on state laws, have been held not to destroy that geographical uniformity which the Constitution requires.[14]

In *Re* Deckert[15] the court say: "The power to except from the operation of the law property not liable to execution under the exemption laws of the several States, as they were actually enforced, was at one time questioned, upon the ground that it was a violation of the constitutional requirement of uniformity, but it has thus far been sustained, for the reason that it was made a rule of the law to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. This is not unjust, as every debt is contracted with reference to the rights of the parties thereto under existing exemption laws, and no creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of creditors. One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. It is quite proper, therefore, to confine its operation to such property as other legal process could reach. A rule which operates to this effect throughout the United States is uniform within the meaning of that term, as used in the Constitution."

And in Hanover Nat. Bank v. Moyses, the court declare: "We concur in this view, and hold that the system is, in the constitutional sense, uniform throughout the United States, when the trustee [under the Act of 1898] takes in each State whatever would have been available to the creditor if the bankrupt law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different States."

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[14] Nor to violate the principle that Congress may not delegate legislative power to the States. Hanover Nat. Bank v. Moyses, 186 U. S. 181; 22 Sup. Ct. Rep. 857; 46 L. ed. 1113.

[15] 2 Hughes 183, Fed. Cas. No. 3,728.

§ 383. Due Process of Law.

Provisions for voluntary proceedings in bankruptcy are not in violation of the due process of law clauses of the Fifth and Fourteenth Amendments, even when, as in the federal act of 1898, there is no requirement as to notice to creditors of the filing of the petition. In the Hanover Bank case the court say: "Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law. . . . Proceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem*. . . . Creditors are bound by the proceeding in distribution on notice by publication and mail, and when jurisdiction has attached and been exercised to that extent, the court has jurisdiction to decree discharge, if sufficient opportunity to show cause to the contrary is afforded, on notice given in the same way. The determination of the status of the honest and unfortunate debtor by his liberation from incumbrance on future exertion is matter of public concern, and Congress has power to accomplish it throughout the United States by proceedings at the debtor's domicile. If such notice to those who may be interested in opposing discharge, as the nature of the proceeding admits, is provided to be given, that is sufficient. Service of process or personal notice is not essential to the binding force of the decree."

§ 384. State Laws Suspended but not Annulled by Federal Bankruptcy Law. Effect of the Law of 1898.

The enactment of a national bankrupt law does not operate to annul state laws on the same subject, but simply to suspend their operation so long as the national regulations are in force. Upon the repeal of the federal law the state laws at once revive, and do not need re-enactment.[16] So also a state law passed while a federal bankruptcy law is in force goes at once into force with the repeal of the federal statute.[17]

The precise effect of the enactment of a federal bankruptcy law in suspending the operation of existing state laws is not definitely

[16] Butler v. Goreley, 146 U. S. 303; 13 Sup. Ct. Rep. 84; 36 L. ed. 981.
[17] Palmer v. Hixon, 74 Me. 447.

coined. There has been no question but that the States possess no concurrent jurisdiction. The power is an exclusively federal one.[20]

§ 386. Weights and Measures.

With reference to standards of weights and measurements, the rule is otherwise, the States being recognized to have power to legislate in the absence of congressional action.

COUNTERFEITING.

§ 387. Counterfeiting.

Congress is expressly given the power "to provide for the punishment of counterfeiting the securities and current coin of the United States." There is little doubt, however, that, had the power not been expressly given, it would have been held implied in the power given to coin. The power of Congress to prohibit and to provide punishment for the counterfeiting of the coins and securities of foreign countries is considered elsewhere.[21]

§ 388. The Passing and the Uttering of Counterfeit Coins Distinct Offenses.

The passing of counterfeit coins or securities is an offense distinct from that of coining or "uttering" them, but the power to punish the former is implied in the authority to forbid the latter.

With reference to this distinction between the uttering and the passing of counterfeit currency, the court in Fox v. Ohio[22] say: "The power is an offense directly against the government, by which individuals may be affected; the other is a private wrong, by which the government may be remotely if it will in any degree, be reached. . . . The punishment of a cheat or a misdemeanor practised within the State, and against those whom she is bound to protect, is peculiarly and appropriately within her functions, and it is difficult to imagine an interference with those duties and functions which would be regular or justifiable."

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[20] By Section X, Clause 1, of Article I, the States are expressly denied the power to coin money.

[21] See p. 256.

[22] 5 How. 410; 12 L. ed. 213.

"Post-offices and post-roads," say the court, "are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress because, being national in their operation, they should be under the protecting care of the National Government. The powers thus granted are not confined to the instrumentalities of commerce or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstance."

§ 390. Constitutional Views of Monroe.

In early years the view was maintained by some that by this grant Congress was given the power only to designate the routes over which the mails should be carried, and the post-offices where it should be received and distributed, and to exercise the necessary protection in relation thereto, and that it did not provide the authority to construct and operate agencies for the carrying and distributing of mails. This was substantially the view taken by Monroe in the paper sent to Congress in connection with his veto of May 4, 1822, of the Cumberland Road bill.

"If we were to ask any number of our enlightened citizens, who had no connection with public affairs, and whose minds were unprejudiced, what was the import of the word 'establish' and the extent of the grant, which controls," says Monroe, "we do not think, that there would be any difference of opinion among them. We are satisfied, that all of them would answer, that a power was thereby given to Congress to fix on the towns, court-houses, and other places, through our Union, at which there should be post-offices; the routes, by which the mails should be carried from one post-office to another, so as to diffuse intelligence as extensively, and to make the institution as useful as possible; to fix the postage to be paid on every letter and packet thus carried to support the establishment; and to protect the post-offices and mails from robbery, by punishing those, who should commit the offense. The idea of the right to lay off the roads of the United

States, on a general scale of improvement; to take the soil from the proprietor by force; to establish turnpikes and tolls, and to punish offenders in the manner stated above, would never occur to any such person. The use of the existing road, by the stage, mail-carrier, or post-boy, in passing over it, as others do, is all that would be thought of; the jurisdiction and soil remaining to the State, with a right in the State, or those authorized by its legislature, to change the road at pleasure."

§ 201. Federal Power to Provide Postal Agencies.

In considerable measure Congress has in its legislation kept within the limits of the power conceded to it by Monroe, but, when it has thought it wise, it has not hesitated to overstep them, and its constitutional right so to do has for years been conceded.[27]

In *California v. Central Pacific R. R. Co.*[28] was involved the power of Congress to construct, or to authorize individuals to construct railroads across the States and Territories. This power the court held to be implied not only in the power given to Congress to regulate commerce, but in its authority to provide for postal accommodations and military exigencies.

§ 202. Exclusion from the Mails: Freedom of Press: Searches and Seizures. Ex parte Jackson.

In *Ex parte Jackson*[29] was questioned the constitutional power of Congress to exclude lottery tickets from the mails, and in determining this the court found it necessary to consider the general extent of the administrative control that might be exercised over the postal service, and especially the relation thereof to the constitutionally guaranteed immunity of the people to be secure against unreasonable searches and seizures, as well as to freedom of the press. In its opinion the court point out that without constitutional objection having been made, the power vested in Congress "to establish post-offices and post-roads," had, from the

[27] Cf. Story, Commentaries, § 1123 for an argument sustaining these broader powers.

[28] 127 U. S. 1; 8 Sup. Ct. Rep. 1073; 32 L. ed. 1050.

[29] 96 U. S. 727; 24 L. ed. 877.

beginning, been construed to authorize not only the designation of the routes over which the mail should be carried, the location of the offices wherein the mail matter should be received and distributed, the carriage of that matter, and the establishment of regulations providing for its safe and speedy transit and prompt delivery, but the determination of what matter should be carried, its classification, its weight and form, and the charges to be made. This right to designate what shall be carried, it is declared, carries with it the right to determine what shall be excluded.

However, the difficulty in this case arose not so much with establishing the power of Congress to exclude objectionable matter from the mails, as with upholding the power to provide measures for enforcing effectively the rules of exclusion which might be legislatively declared. For, obviously, the presence in the mails of the prescribed matter could be determined only by examination of the mail matter by the proper administrative officer, and the granting of such a right of examination, it was claimed, was in violation of constitutionally guaranteed rights of the people. The court say: "The difficulty attending the subject arises, not from the want of power in Congress to prescribe the regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail. In their enforcement, a distinction is to be made between different kinds of mail matter; between what is intended to be kept from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets and other printed matter, purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail they can only be opened

and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution. Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed without the circulation the publication would be of little value. If, therefore, printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress."

After calling attention to the fact that in 1836 the question of the power of Congress to exclude certain publications from the mails had been discussed in the Senate and that the prevailing view had been that Congress had not this power,[30] the court con-

[30] "In 1836, the question of the power of Congress to exclude publications from the mail was discussed in the Senate; and the prevailing opinion of its members, as expressed in debate, was against the existence of the power. President Jackson in his annual message of the previous year, had referred to the attempted circulation through the mails of inflammatory appeals, addressed to the passions of the slaves, in prints and in various publications, tending to stimulate them to insurrection; and suggested to Congress the propriety of passing a law prohibiting, under severe penalties, such circulation of 'incendiary publications' in the Southern States. In the Senate, that portion of the message was referred to a select committee, of which Mr. Calhoun was chairman, and he made an elaborate report on the subject, in which he contended that it belonged to the States, and not to Congress, to determine what is and what is not calculated to disturb their security, and that to hold otherwise would be fatal to the States; for if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary, and enforce their circulation. Whilst, therefore, condemning in the strongest terms the circulation of the publications, he insisted that Congress had not power to pass a law prohibiting their transmission through the mail, on the ground that it would abridge the liberty of the press. 'To under-

tinue: "Great reliance is placed by the petitioner upon these views, coming as they did in many instances, from men alike distinguished as jurists and statesmen. But it is evident that they were founded upon the assumption that it is competent for Congress to prohibit the transportation of newspapers and pamphlets over postal routes in any other way than by mail; and of course it would follow, that if with such a prohibition, the transportation in the mail could also be forbidden, the circulation of the documents would be destroyed, and a fatal blow given to the freedom of the press. But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may, perhaps, prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted — consisting of letters, and of newspapers and pamphlets,

stand,' he said, 'more fully the extent of the control which the right of prohibiting circulation through the mail would give to the government over the press, it must be borne in mind that the power of Congress over the post-office and the mail is an exclusive power. It must also be remembered that Congress, in the exercise of this power, may declare any road or navigable water to be a post-road; and that by the act of 1825, 4 Stat. at L. 102, it is provided "That no stage, or other vehicle which regularly performs trips on a post-road, or on a road parallel to it shall carry letters." The same provision extends to packets, boats, or other vessels on navigable waters. Like provision may be extended to newspapers and pamphlets, which, if it be admitted that Congress has the right to discriminate in reference to their character, what papers shall or what shall not be transmitted by the mail, would subject the freedom of the press, on all subjects, political, moral and religious, completely to its will and pleasure. It would, in fact, in some respects, more effectively control the freedom of the press than any sedition law, however severe its penalties.' Mr. Calhoun, at the same time, contended that when a State had pronounced certain publications to be dangerous to its peace, and prohibited their circulation, it was the duty of Congress to respect its laws and co-operate in their enforcement; and whilst, therefore, Congress could not prohibit the transmission of the incendiary documents through the mails, it could prevent their delivery by the postmasters in the States where their circulation was forbidden. In the discussion upon the bill reported by him, similar views against the power of Congress were expressed by other Senators, who did not concur in the opinion that the delivery of papers could be prevented when their transmission was permitted."

when not sent as merchandise; but further than this its power of prohibition cannot extend. Whilst regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters, or sealed packages subject to letter postage, without warrant issued upon oath or affirmation, in the search for prohibited matter, they may be enforced upon competent evidence of their violation obtained in other ways; as from the parties receiving the letters and packages, or from agents depositing them in the post-office, or others cognizant of the facts. And as to the objectionable printed matter which is open to examination, the regulations may be enforced in a similar way, by the imposition of penalties for their violation through the courts, and, in some cases, by the direct action of the officers of the postal service. In many instances those officers can act upon their own inspection, and, from the nature of the case, must act without other proof; as where the postage is not prepaid, or where there is an excess of weight over the amount prescribed, or where the object is exposed, and shows unmistakably that it is prohibited, as in the case of an obscene picture or print. In such cases, no difficulty arises and no principle is violated in excluding the prohibited articles or refusing to forward them. The evidence respecting them is seen by everyone, and is in its nature conclusive. In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals."

§ 393 Ex parte Rapier.

In *Ex parte* Rapier[31] it was again argued that Congress was without the constitutional power to forbid the use of the mails to lottery tickets, circulars, etc., but this time upon the ground that Congress was without the power to declare the lottery itself a criminal enterprise. "Where Congress cannot by direct legislation pronounce a business to be a crime and punish it as such,"

[31] 143 U. S. 110; 12 Sup. Ct. Rep. 374; 36 L. ed. 93.

counsel argued, "it is not competent to Congress to determine it to be a crime, and to deprive it of the benefit of the mails for the sole purpose of endeavoring to suppress it." To this the court replied: "The States before the Union was formed could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime and immorality. The argument that there is a distinction between *mala prohibita* and *mala in se,* and that Congress might forbid the use of the mails in promotion of such acts as are universally regarded as *mala in se,* including all such crimes as murder, arson, burglary, etc., and the offense of circulating obscene books and papers, but cannot do so in respect of other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of petitioners, since it would be for Congress to determine what are within and what without the rule; but we think there is no room for such a distinction here, and that it must be left to Congress in the exercise of a sound discretion to determine in what manner it will exercise the power it undoubtedly possesses. We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the constitutional provision unless Congress is abso-

immoral, fraudulent, or otherwise objectionable, except, of course, the distribution of matter treasonable to the United States or inciting resistance to its laws may not be authorized, nor may interstate commerce be regulated.

§ 396. Fraud Orders.

In a later chapter dealing with administrative powers will be discussed the extent of the discretionary power that may be granted the Postmaster-General and his agents in excluding matter from the mails under so-called "fraud orders."

§ 397. Protection of the Mails: In Re Debs.

In *Re* Debs[34] was presented the question whether, for the protection of the mails, as well as of interstate commerce, the Federal Government may, by the use of judicial restraining orders or the employment of its armed forces, prevent interference, or whether it is obliged to wait until there has been such interference, and then punish the guilty ones in its courts. The court held that the former as well as the latter means was open to it.[35]

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[34] 158 U. S. 564; 15 Sup. Ct. Rep. 900; 39 L. ed. 1092.

[35] "Doubtless, it is within the competency of Congress to prescribe by legislation that any interferences with these matters shall be offenses against the United States, and prosecuted and punished by indictments in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. By article 3, section 2, clause 3, of the Federal Constitution it is provided: 'The trial of all crimes except in cases of impeachment shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed.' If all the inhabitants of the State, or even a great body of them should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offenses had in such a community would be doomed in advance to failure. And if the certainty of such failure was known, and the National Government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single State. But there is no such impotency in the National Government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by

The granting to Congress of the power to declare criminal interference with the mails, or, indeed, interference with the performance by any federal agent of his official duties, does not necessarily carry with it an exemption of such postal agents from arrest and punishment by the States for violations of the States' penal laws, even though the operation of the mails may, incidentally and to a slight extent, be affected.[36]

PATENTS AND COPYRIGHTS.

§ 398. Patents.

Congress is given the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The granting by the United States of a patent right does not give to the patentee the authority to exercise it in a State in violation of the police laws of that State.

In Patterson v. Kentucky[37] the court say: "The right which the patentee or his assignee possesses in the property, created by the application of a patented discovery, must be enjoyed subject

the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws."

[36] In United States v. Kirby, 7 Wall. 482; 19 L. ed. 278, the court say: "No officer or employee of the United States is placed by his position, or the services he is called to perform, above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention, when accused of felony, in the form prescribed by the Constitution and laws. The public inconvenience which may occasionally follow from the temporary delay in the transmission of the mail caused by the arrest of its carriers upon such charges, is far less than that which would arise from the extending to them the immunity for which the counsel of the government contends. Indeed, it may be doubted whether it is competent for Congress to exempt the employees of the United States from arrests in criminal processes from the state courts and when the crimes charged against them are not merely *mala prohibita*, but are *mala in se*. But whether legislation of that character be constitutional or not, no intention to extend such exemption should be attributed to Congress unless clearly manifested by its language."

[37] 97 U. S. 501; 24 L. ed. 1115.

to the complete and salutary power with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few. The right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright of the map itself. . . . The right to sell . . . was not derived from the patent; that right existed before the patent, and, unless prohibited by valid local laws, could have been exercised without the grant of letters patent. The right which the patent primarily secures is the exclusive right in the discovery, which is an incorporeal right. . . . The enjoyment of that incorporeal right may be secured and protected by national authority against all hostile state legislation; but the tangible property which comes into existence by the application of the discovery is not beyond the control, as to its use, of state legislation, simply because the inventor acquires a monopoly in the discovery."

Applying the principles of the Patterson v. Kentucky case the court in Webber v. Virginia[38] sustained the power of the State to require the payment of a license fee for the sale of sewing-machines, even though these machines were manufactured under a United States patent.[39]

The relation of the taxing and other powers of the States to patent rights granted by the United States is more fully discussed in Section 48.

§ 399. Copyrights: Trade-Marks.

In the Trade-Mark Cases[40] it was held that the ordinary trade-mark has no necessary relation to invention or discovery, and, therefore, its use may not be regulated by Congress under the power to provide for the issuance of patents and copyrights.

[38] 103 U. S. 334; 26 L. ed. 565.
[39] See also Allen v. Riley, 203 U. S. 347; 27 Sup. Ct. Rep. 95; 51 L. ed. 216.
[40] 100 U. S. 82; 25 L. ed. 550.

Lacking this authority the court held that the Federal Government has power to legislate with reference to trade-marks only in so far as their use in interstate trade is concerned. The law in question in the case not being thus limited was held void.[41]

In Higgins v. Keuffel[42] it was held that a mere label might not be copyrighted. "To be entitled to a copyright," the court declared, "the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached."

Little v. Gould[43] is the authority for the doctrine that, in the absence of congressional regulation, a State may afford protection to literary productions.

PIRACIES AND FELONIES ON THE HIGH SEAS, AND OFFENSES AGAINST THE LAW OF NATIONS.

§ 400. Piracies, etc.

The power of the United States to define and punish piracies and other crimes committed upon the high seas, and offenses against the law of nations, may be supported upon three constitutional grants,— one express and two implied. In Article I, Section VIII, Clause 10, it is expressly given. It may also be implied from the federal admiralty and maritime jurisdiction, and from the general control granted to the Federal Government in all that concerns foreign affairs. The implied power under the maritime jurisdiction is broader, territorially, than that given in Article I, Section VIII, Clause 10, inasmuch as admiralty jurisdiction has been construed to extend not only over the high seas, but over the public navigable waters.

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[41] The law thus held void was enacted July 8, 1870. The law dated March 3, 1881, was expressly limited in its operation to interstate and foreign commerce, and with Indian Tribes, and was held valid in Ryder v. Holt, 128 U. S. 525; 9 Sup. Ct. Rep. 145; 32 L. ed. 529. The present law was enacted Feb. 20, 1905 and has been since amended. The last amendatory act bears date March 4, 1909.

[42] 140 U. S. 428; 11 Sup. Ct. Rep. 731; 35 L. ed. 470.

[43] 2 Blatchf. 165.

The authority given to Congress to define and punish all offenses against the law of nations would seem to be broad enough to authorize the prohibition and punishment of acts which, though committed within the territorial limits of the United States, may give rise to international responsibilities upon the part of the United States. It would also seem that this authority may be implied from the general fact that to the Federal Government is given the exclusive control of foreign relations, and to it alone do foreign States look for the redress of any injuries which they may conceive themselves to have suffered. Where, therefore, the responsibility is imposed, the right to prevent its accruing may properly be implied.

A most intersting case upon this point is that of United States v. Arjona[44] in which was questioned the constitutionality of the law of Congress defining as a crime the counterfeiting within the United States of the notes, bonds, and other securities of foreign governments. The authority for this act could not be found in Article I, Section VIII, Clause 6, for that relates only to the securities and current coin of the United States. Therefore, in sustaining its validity the court was obliged to have recourse to the authority to punish offenses against the law of nations and to the general control which the Federal Government has over all matters that pertain to or may involve international rights and responsibilities.[45]

By the clause under discussion Congress is given the power not simply to provide for the punishment of piracy as defined by the law of nations, but itself to define what shall constitute the offense and to punish it as such. Thus, for example, the slave trade, though not declared by international law to be piracy, has by Congress been declared so to be.[46]

WAR.

§ 401. Declaration of War.

As is well known the existence of war, that is, a contest the parties to which have been recognized as belligerents, is a status

[44] 120 U. S. 479; 7 Sup. Ct. Rep. 628; 30 L. ed. 728.

[45] See *ante*, p. 256.

[46] U. S. Rev. Stat., §§ 5375–5376.

that gives rise to numerous legal consequences to the parties involved, to neutral powers, to the actual combatants and to noncombatants. In all countries, it is, therefore, a matter of great importance, what authority shall have the constitutional power of creating such a status, and of determining the date of its beginning.

§ 402. Civil War.

That, under our Constitution, the United States may begin war against a foreign country only by a declaration issued by Congress has never been disputed, the Constitution expressly providing that Congress shall have the power to declare war. That a foreign nation, or insurrectionary body of citizens, may by invasion of the United States or by other acts bring about a condition of affairs which will warrant the President in declaring, in advance of congressional legislation, that a state of war exists, was asserted by the Supreme Court in the Prize Cases.[47] After very properly holding that a public war may exist between a State and its rebellious citizens as well as between independent nations, the court say: "A civil war is never solemnly declared; it becomes such by its accidents — the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war."

This is true enough as to foreign powers. All nations have the power and right, usable at their discretion, in the case of a civil contest in another State, to determine, each for itself, whether the struggle is to be treated as a war and the parties to it as belligerents. They are not bound by the action which the State concerned may take or has taken. Nor, on the other hand, is that State bound by the action of foreign States. It may continue to treat as

[47] 2 Black, 635; 17 L. ed. 459.

rebels the insurgents who have been recognized as belligerents by foreign powers, and it would, therefore, seem that, in the United States, from the constitutional viewpoint, it should lie with the war-declaring power, that is, with Congress, to determine when the civil struggle should be recognized as a war. In advance of such recognition the executive would have the authority to use the entire force of the nation in the enforcement of its laws, as, in the case of an invasion, or other attack by a foreign power, but, it would seem, he should not be given the power to do more than this and by his own *ipse dixit* declare that a public war exists. The court in the Prize Cases say: "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." This also is quite true. As between the United States and a State thus attacking it, and as concerns neutral States, a war may thus be brought into existence without a declaration. But from this it does not necessarily follow that as concerns our citizens the legal rights and responsibilities attendant upon a state of war may be brought into force without the action of the constitutional law-declaring power. However, the court in the Prize Cases say: "Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decisions and acts of the Political Department of the government to which this power was intrusted. He must determine what degree of force the crisis demands. The proclamation of blockade is, itself, official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case." [48]

[48] In the Prize Cases four justices, including Chief Justice Taney, dissented, the ground of this dissent being in a considerable measure that indicated by the author.

CHAPTER XLV.

PROHIBITIONS ON CONGRESS.

§ 405. Absolute and Qualified Prohibitions.

In the chapters which have gone before, the powers of Congress have been considered. In connection therewith have been discussed the express and implied limitations which restrain Congress in the exercise of those powers, as, for example, with reference to the subject of taxation, the express limitation that all taxes, other than direct, shall be uniform throughout the United States, and the implied limitation, that the salaries of state officials, or the evidences of state indebtedness shall not be federally taxed.

In the present chapter we shall have to deal with the general limitations laid by the Constitution upon Congress, either by way of the absolute denial to Congress of a power, or by way of provision that the power shall be exercised only under certain specified circumstances.

It would seem that certain of these limitations thus expressly imposed operate as an absolute denial to Congress of a legislative power with reference to the subjects specified, without regard to time or place. Others of these limitations, as was held in the Insular Cases, serve to restrain the legislative powers of Congress only when dealing with the States and incorporated territories.[1]

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1 "There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time and place, and such as are operative only 'throughout the United States' or among the several States. Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States' it goes to the competency of Congress to pass a bill of that description. Perhaps the same remark may be applied to the First Amendment that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people to peacefully assemble and to petition the government for a redress of grievances.' We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight Amendments is of general and how far

[illegible] migration or im-
[illegible] States now existing shall
[illegible] prohibited by the Congress
[illegible] become obsolete.

[illegible] of persons into the United
[illegible] States is exclusive as regards
[illegible] foreign relations. The States
[illegible] the United States, such a
[illegible] constitutional objection that it is
[illegible] describing it in its title as in
[illegible] authorizes immigrants to be in-
[illegible] being criminals, paupers, lunatics,
[illegible] public charge. Inspection laws and
[illegible] exports," the Supreme Court has de-
[illegible] property and not to persons.[2]

[illegible] other hand, when the Constitution declares that
[illegible] throughout the United States' it becomes neces-
[illegible] there be any territory over which Congress has juris-
[illegible] of the 'United States,' by which term we under-
[illegible] people united to form the Constitution, and such as
[illegible] to the Union upon an equality with them. . . . We
[illegible] to decide, that there may be a distinction between
[illegible] enforced in the Constitution by prohibitions against
[illegible] and what may be termed artificial or remedial rights
[illegible] our own system of jurisprudence. Of the former class
[illegible] own religious opinions and to a public expression of
[illegible] said, to worship God according to the dictates of one's
[illegible] the right to personal liberty and individual property; to
[illegible] and of the press; to free access to courts of justice, to due
[illegible] law, and to an equal protection of the laws; to immunities from
[illegible] searches and seizures, as well as cruel and unusual punishments;
[illegible] other immunities as are indispensable to a free government. Of
[illegible] are the rights to citizenship, suffrage (Minor v. Happersett,
[illegible] L. ed. 627), and to the particular methods of procedure
[illegible] in the Constitution, which are peculiar to Anglo-Saxon juris-
[illegible] and some of which have already been held by the States to be
[illegible] to the proper protection of individuals." Justice Brown in
[illegible] v. Bidwell, 182 U. S. 244; 21 Sup. Ct. Rep. 770; 45 L. ed. 1088.

[illegible] York v. Compagnie Générale Transatlantique, 107 U. S. 59; 2 Sup.
[illegible] 27 L. ed. 383.

§ 407. Suspension of Habeas Corpus.

The provision that the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it, is considered in a later chapter dealing with Martial Law.[3]

§ 408. Bills of Attainder.

Clause 3 of Section IX of Article I provides that "No bill of attainder . . . shall be passed."

This clause has given rise to an inconsiderable number of judicial determinations. The principal case in definition of a bill of attainder is that of Cummings v. Missouri,[4] in which the court held unconstitutional the test oath of loyalty imposed by the Constitution of Missouri as a condition precedent to holding any state office of trust or profit, or practising the profession of the law or ministry. The court declared: "The disabilities created by the Constitution of Missouri must be regarded as penalties — they constitute punishment." The oath, the opinion asserts, "was enacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties who had committed them of some of the rights and privileges of the citizen."

"A bill of attainder is a legislative act, which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body in addition to its legitimate functions, exercises the powers and office of judge, it assumes, in the language of the text-books, judicial magistracy;

[3] Chapter LXII.

[4] 4 Wall. 277; 18 L. ed. 356.

In *Ex parte* Garland,[6] decided at the same time as the Cummings case, the court held void, as a bill of attainder, the act of Congress of January 24, 1865, prescribing an oath that the deponent had never voluntarily borne arms against the United States, given aid to its enemies, etc., as a qualification for admission as an attorney, before the federal courts.[7]

A statute making the non-payment of taxes evidence of disloyalty during the Civil War and providing for the forfeiture of lands without a judicial hearing has been held to be a bill of attainder,[8] as has a law excluding from the United States Chinese who are citizens of the United States.[9]

§ 409. Ex Post Facto Legislation.

The same clause of the Constitution which prohibits bills of attainder, declares that no *ex post facto* legislation shall be passed.

In the early case of Calder v. Bull[10] the prohibition was declared to relate only to criminal and not to civil proceedings, and, as thus limited, *ex post facto* laws were declared to be "every law that makes an action done before the passing of a law, and which was innocent when done, criminal; and punishes such action. Every law that aggravates a crime, or makes it greater than it was, when committed. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. Every law that alters the legal rules of evidence, and requires less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender."

By later decisions this definition of *ex post facto* legislation has been broadened so as to include all laws which in any way operate

[6] 4 Wall. 333; 18 L. ed. 366.

[7] Justices Miller, Swayne, and Davis dissented in both the Garland and Cummings cases.

[8] Martin v. Snowden, 18 Gratt. 100.

[9] In re Yang Sing Hee, 13 Saw. 486.

[10] 3 Dall. 386; 1 L. ed. 648.

to the detriment of one accused of a crime committed prior to the enactment of such laws.[11]

[11] In Thompson v. Utah (170 U. S. 343; 18 Sup. Ct. Rep. 620; 42 L. ed. 1061), the more important adjudications with reference to this subject are summarized as follows: "It is sufficient now to say that a statute belongs to that class [of *ex post facto* laws], which by its necessary operation and 'in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage. (United States v. Hall, 2 Wash. C. C. 366; Kring v. Missouri, 107 U. S. 221; 2 Sup. Ct. Rep. 443; 27 L. ed. 506; Medley, Petitioner, 134 U. S. 160; 10 Sup. Ct. Rep. 384; 33 L. ed. 835.) Of course a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offense was committed. And, therefore, it is well settled that the accused is not of right entitled to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offense charged against him. Cooley in his Treatise on Constitutional Limitations, after referring to some of the adjudged cases relating to *ex post facto* laws, says: 'But so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.' Chap. 9, § 272. And this view was substantially approved by this court in Kring v. Missouri, above cited. So, in Hopt v. Utah (110 U. S. 574; 4 Sup. Ct. Rep. 202; 28 L. ed. 262), it was said that no one had a vested right in mere modes of procedure, and that it was for the State, upon grounds of public policy, to regulate procedure at its pleasure. This court, in Duncan v. Missouri (152 U. S. 377; 14 Sup. Ct. Rep. 570; 38 L. ed. 485), said that statutes regulating procedure if they leave untouched all the substantial protections with which existing law surrounds the person accused of crime, are not within the constitutional inhibition of *ex post facto* laws. But it was held in Hopt v. Utah (above cited), that a statute which takes from the accused a substantial right given to him by the law in force at the time to which his guilt relates would be *ex post facto* in its nature and operation, and that legislation of that kind cannot be sustained simply because, in a general sense, it may be said to regulate procedure. The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure, as in determining whether particular statutes by their operation take from an accused any right that was regarded, at the time of the adoption of the

In Thompson v. Missouri[12] the authorities are again reviewed, the court in this case holding that a state statute authorizing the comparison of disputed handwriting with any writing proved to be genuine is not an *ex post facto* law in its application to crimes previously committed, as altering the legal rules of evidence in existence at the time of the commission of the offense.

§ 410. Appropriations.

It is provided that "no money shall be drawn from the treasury but in consequence of appropriations made by law."

This restriction, it is apparent, operates rather upon the officials of the Treasury Department than upon Congress. The legislative body is left free to authorize such expenditures as it may see fit, and to direct the payments to be made by the Secretary of the Treasury. This direction having been given by law, no discretionary power is left with the Treasury Department to determine whether the payment is a proper one.[13]

Congress may, as has been earlier pointed out,[14] appropriate sums of money for private purposes; for the construction and maintenance of works which the United States could not constitutionally itself construct or operate; and recognize and pay claims of merely an equitable or moral nature.[15]

That money once covered into the United States Treasury may not, by a judicial process, be recovered therefrom without the sanction of an act of Congress, is further discussed under the title "Suability of the United States."[16]

Constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the offense charged against him."

Mr. Brainerd T. De Witt has an interesting article in the *Political Science Quarterly*, XV, p. 76, entitled "Are Our Legal Tender Laws *Ex Post Facto?*" in which he seeks to show, and with considerable success, that the framers of the Constitution probably intended that the prohibition upon the Federal Government to pass *ex post facto* laws should include a denial of the right of legislation to impair the obligation of valid contracts previously entered into.

[12] 171 U. S. 380; 18 Sup. Ct. Rep. 922; 43 L. ed. 204.

[13] United States v. Price, 116 U. S. 43; 6 Sup. Ct. Rep. 235; 29 L. ed. 541.

[14] Section 269.

[15] United States v. Realty Co., 163 U. S. 427; 16 Sup. Ct. Rep. 1120; 41 L. ed. 215.

[16] Chapter LIV.

§ 411. Limitations with Respect to the Definition and Punishment of Crime.

By various provisions of the Constitution as originally adopted, and in the Amendments thereto, restrictions have been placed upon the Federal Government with reference to the definition of and trial and punishment for crime. These limitations will be considered in the sections which follow.

§ 412. Jury Trial.

By Article III, Section II, Clause 3, it is provided that "The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

By the Sixth Amendment, this requirement of a jury is repeated and the additional conditions imposed that the trial of persons accused of crime shall be speedy and public, the jury an impartial one, selected from the State and district wherein the crimes shall have been committed, which district shall have been previously ascertained by law, and that the accused shall be informed of the nature and cause of the accusation, be confronted with the witnesses against him, have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defense.

The relation between this Amendment, and the third clause of Section II of Article III is, as stated in Callan v. Wilson,[17] that in the latter are enumerated, *ex abundanti cautela,* the rights to which, according to settled rules of common law, the accused is entitled.[18]

Offenses committed outside the jurisdiction of a State are not local, but may be tried at such places as may be designated by Congress.

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[17] 127 U. S. 540; 8 Sup. Ct. Rep. 1301; 32 L. ed. 223.

[18] *Cf.* Story, *Commentaries,* § 1791.

In the first crimes act of April 30, 1790, it was provided that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought." In other words, the provisions of the Sixth Amendment were held by Congress to apply only to crimes committed within a State and within its jurisdiction.[19]

§ 413. Jury Trial in the District of Columbia and the Territories

In Callan v. Wilson[20] it was held that the right of jury trial necessarily applied within the District of Columbia and the Territories.[21] As to this the court say that this right "was demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia as those residing in the several States. There is nothing in the history of the Constitution or of the original amendments, to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property — especially of the privilege of trial by jury in criminal cases."

§ 414. Unanimity.

In Springville v. Thomas[22] it was claimed that the territorial legislature of Utah was empowered by the organic act [of Congress] September 9, 1850, to provide that unanimity of action on the part of the jurors in civil cases was not necessary to a valid verdict. The Supreme Court, however, said: "In our opinion the Seventh Amendment secured unanimity in finding a verdict as

[19] United States v. Dawson, 15 How. 467; 14 L. ed. 775; Jones v. United States, 137 U. S. 202; 11 Sup. Ct. Rep. 80; 34 L. ed. 691.

[20] 127 U. S. 540; 8 Sup. Ct. Rep. 1301; 32 L. ed. 223.

[21] By the later Insular Cases four of the justices held that this is true only as to "incorporated" territories, while Justice Brown held that it applies only when Congress has expressly or impliedly extended the Constitution to the territory in question.

[22] 166 U. S. 707; 17 Sup. Ct. Rep. 717; 41 L. ed. 1172.

an essential feature of trial by jury in common-law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so." The reasoning thus applied to the Seventh Amendment would of course equally apply to the Sixth Amendment. It is clear, however, that this *dictum* has been overruled by the Insular Cases so far at least as regards the power of Congress over unincorporated territories.

§ 415. Twelve Jurors Required.

This declaration in Springville v. Thomas is quoted with approval in Thompson v. Utah,[23] the court adding: "It is equally beyond question that the provisions of the National Constitution relating to criminal prosecutions apply to the territories of the United States." Assuming this to be true the court, in this latter case go on to inquire whether the jury referred to in the Constitution is necessarily a jury of twelve persons, neither more nor less. This inquiry is resolved in the affirmative, and the court say: "When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons." [24]

§ 416. Courts and Actions in which Jury not Required.

The right of trial by jury provided for in the Constitution applies only in the federal courts, and in them it applies only to those cases in which, by common practice at the time the Constitution was adopted, it was employed in the colonies and in Eng-

[23] 170 U. S. 343; 18 Sup. Ct. Rep. 620; 42 L. ed. 1061.

[24] In Capital Traction Co. v. Hof (174 U. S. 1; 19 Sup. Ct. Rep. 580; 43 L. ed. 873) the court say: "It is beyond question at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia" (quoting Webster v. Reid, 11 How. 437; 13 L. ed. [illegible]; Callan v. Wilson, 127 U. S. 540; 8 Sup. Ct. Rep. 1301; 32 L. ed. 223; Thompson v. Utah, 170 U. S. 343; 18 Sup. Ct. Rep. 620; 42 L. ed. 1061).

land. Thus it does not apply to equity causes, to cases in admiralty and to military courts, nor where the special prerogative rights of courts are involved, as, for example, in proceedings for disbarment or for contempt.[25]

A serious constitutional question might, however, be raised by a legislative attempt to extend equity jurisdiction over a matter not essentially equitable in nature, and thus render it triable without a jury. As to such action upon the part of the States, the federal question involved would be one of due process of law.[26]

In habeas corpus proceedings a jury is neither required nor proper.

It has been held that due process of law does not require a jury

[25] In *Re* Debs (158 U. S. 564; 15 Sup. Ct. Rep. 900; 39 L. ed. 1092), after asserting that it is often within the competence of a court of equity to enjoin the commission of an act; even though that act be also forbidden by the criminal law, the court declare: "Nor is there in this any invasion of the constitutional right of trial by jury . . . the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

In Eilenbecker v. Dist. Court of Plymouth Co. (134 U. S. 31; 10 Sup. Ct. Rep. 424; 33 L. ed. 801), the court say: "If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes, one of the powers necessarily incident to a court of justice — that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power."

In *Ex parte* Robinson (19 Wall. 513; 22 L. ed. 205), the court say: "The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." *Cf. Ex parte* Terry, 128 U. S. 289; 9 Sup. Ct. Rep. 77; 32 L. ed. 405.

[26] Mugler v. Kansas, 123 U. S. 623; 8 Sup. Ct. Rep. 273; 31 L. ed. 205.

in the execution of political and executive functions, as, for example, the enforcement of the Chinese exclusion acts.[27]

§ 417. Petty Offenses.

It has been generally recognized by courts, federal as well as state, that the guarantee of the right to a trial by jury does not apply to the petty offenses which, at the time the Constitution was adopted, it was generally recognized might be more summarily dealt with. The enjoyment of the right is not, however, limited to felonies.[28]

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[27] See Chapter LXIV. In Fong Yue Ting v. United States (149 U. S. 698; 13 Sup. Ct. Rep. 1016; 37 L. ed. 905), the court say: "The proceeding before a United States judge, as provided for in section 6 of the Act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for a crime. It is not a banishment in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application."

[28] In Callan v. Wilson (127 U. S. 540; 8 Sup. Ct. Rep. 1301; 32 L. ed. 223), the court say: "The third article of the Constitution provides for a jury in the trial of 'all crimes, except in cases of impeachment. The word 'crime,' in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a 'crime' within the meaning of the third article, or a 'criminal prosecution' within the meaning of the Sixth Amendment. And we do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury."

In Callan v. Wilson,[29] which was an appeal from a judgment refusing, upon writ of habeas corpus, to discharge the appellant from the custody of the marshal of the District of Columbia, the appellant having been sentenced to jail for thirty days upon conviction without jury trial in the police court of the District upon a charge of conspiracy, the Supreme Court, after reviewing cases in the States, and lower federal courts, declare: "Except in that class or grade of offenses called petty offenses, which, according to common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee by an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put to trial for the offense charged. In such cases, a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury in an appellate court, after he has been once fully tried, otherwise than by a jury, in a court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution."

§ 418. Infamous Crimes.

The provision of the Fifth Amendment that no one shall be held to trial for a criminal offense unless on a presentment or indictment of a grand jury, is expressly limited to capital or other infamous crimes.[30] It would seem that there is no hard and fast definition, in American law at least, of an "infamous crime," each case having thus to be decided on its merits. Possibly the best general discussion of the meaning of the term is, however, that of the court in *Ex parte* Wilson,[31] where it is said: "Nor can we accede to the proposition which has been sometimes main-

[29] 127 U. S. 540; 8 Sup. Ct. Rep. 1301; 32 L. ed. 223.

[30] "Cases arising in the land or naval forces, or in the militia, when in actual service in time of war and public danger" are excepted from the grand jury requirement.

[31] 114 U. S. 417; 5 Sup. Ct. Rep. 935; 29 L. ed. 89.

tained, that no crime is infamous, within the meaning of the Fifth Amendment, that has not been so declared by Congress.[32] The purpose of the Amendment was to limit the powers of the legislature, as well as of the prosecuting officers of the United States. We are not indeed disposed to deny that a crime, to the conviction and punishment of which Congress has superadded a disqualification to hold office, is thereby made infamous.[33] But the Constitution protecting everyone from being prosecuted, without the intervention of a grand jury, for any crime which is subject by law to an infamous punishment, no declaration of Congress is needed to secure, or competent to defeat, the constitutional safeguard. The remaining question to be considered is whether imprisonment at hard labor for a term of years is an infamous punishment. Infamous punishments cannot be limited to those punishments which are cruel or unusual; because, by the Seventh Amendment of the Constitution, 'cruel and unusual punishments' are wholly forbidden, and cannot therefore be lawfully inflicted even in cases of convictions upon indictments duly presented by a grand jury. . . . What punishments may be considered as infamous may be affected by the changes of public opinion from one age to another. In former times, being put in the stocks was not considered as necessarily infamous. And by the first Judiciary Act of the United States, whipping was classed with moderate fines and short terms of imprisonment in limiting the criminal jurisdiction of the District Courts to cases 'where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.' (Act of September 24, 1789, chap. 20. § 9; 1 Stat. at L. 77.) But at the present day either stocks or whipping might be thought an infamous punishment. For more than a century, imprisonment at hard labor in the state prison or penitentiary or other institution has been considered an infamous punishment in

[32] Citing United States v. Wynn, 3 McCrary, 266; United States v. Petit, 11 Fed. Rep. 58; United States v. Cross, 1 MacArthur, 149.

[33] United States v. Waddell, 112 U. S. 76; 5 Sup. Ct. Rep. 35; 28 L. ed. 673.

England and America. . . . Deciding nothing beyond what is required by the facts of the case before us, our judgment is that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the Fifth Amendment of the Constitution; and that the District Court, in holding the petitioner to answer for such a crime, and sentencing him to such imprisonment, without indictment by a grand jury, exceeded its jurisdiction, and he is therefore entitled to be discharged."

The practical construction which the cases have put upon the constitutional provision with reference to indictments has been that there must be an indictment in every case in which the imprisonment may be for more than one year, inasmuch as by Section 5541 of the Revised Statutes it is provided that whenever a person is sentenced to more than one year's imprisonment he may be required to serve the sentence in a penitentiary. By the provision of Section 335 of the act of March 4, 1909, revising, amending and codifying the penal laws of the United States, it is declared that " all offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

§ 419. Waiver of Constitutional Guaranties.

The law governing the waiver by the accused of his constitutional right to a trial by jury in criminal actions, or to a trial by less than twelve jurors, and, indeed, the waiver of any constitutional guaranty, is not in a clearly determined condition. In cases arising under state constitutions, inharmonious doctrines have been declared. In some jurisdictions the position has been taken that the guaranties are intended merely for the benefit of the accused and may, therefore, be waived. In other States the courts have held that the guaranty of jury trial in criminal cases is one in which the State also has an interest, and which for that reason may not be waived. In some courts, a third view is taken that the jury is essential to give the court jurisdiction, and that while in case of a plea of guilty, the court may at once pronounce

ments of the Constitution as originally adopted, which establish a form of government which may not be altered by the individual.

The right of the accused to waive jury trial in cases of felony has never come before the Supreme Court; but in Lewis v. United States[38] that court held that, in felonies, the presence of the accused could not be waived either by himself or by counsel. The record must show, affirmatively, the presence of the prisoner in court during the trial.[39] It would seem that, in this case at least, the Supreme Court held that a right guaranteed by the Amendments, as distinguished from those in the body of the Constitution, might not be waived.[40]

§ 420. Right to Jury Trial not Fundamental.

In the majority opinion in Hawaii v. Mankichi[41] the rather surprising statement is made that grand and petit juries in criminal proceedings "are not fundamental in their nature, but concern merely a method of procedure" and that, therefore, these two institutions were not to be construed as necessarily introduced into the islands by the resolution of Congress of July 7, 1898, recognizing the islands "as a part of the territory of the United States and subject to the sovereign dominion thereof," and continuing in force the municipal legislation of such islands not inconsistent with such resolution, "nor contrary to the Constitution of the United States."[42]

§ 421. Speedy Trial.

The Sixth Amendment secures to the accused a speedy as well as a public trial.

This provision has received very little discussion in the federal

[38] 146 U. S. 370; 13 Sup. Ct. Rep. 136; 36 L. ed. 1011.

[39] Justices Brewer and Brown dissenting.

[40] As to the waiver by the accused of his right to plead *autrefois acquit*, by taking an appeal to a superior court, see p. 816, section entitled "Double Jeopardy."

[41] 190 U. S. 197; 23 Sup. Ct. Rep. 787; 47 L. ed. 1016.

[42] To this doctrine Justice Harlan vigorously dissented, the reasoning of whose opinion it is not easy to answer.

From this class of acts which constitute two or more distinct offenses, are to be distinguished those acts which are punishable by the tribunals of two or more countries, or by two or more tribunals of the same country. Here the offense is a simple one, but cognizable in two jurisdictions. In such case an acquittal or punishment in one may be pleaded in bar to a prosecution in another court based upon the same act. Thus, in Grafton v. United States[45] it was held that one acquittal by a military court of competent jurisdiction could not be tried a second time in a civil court for the same offense.[46]

This doctrine holds even though the punishment which may be inflicted by the court is different from or greater than that which may be imposed by the other; or even if the indictment in the one court charge a different crime from that stated in the other. In Chitty's *Criminal Law* it is said: "It is not in all cases necessary that the two charges should be precisely the same in point of degree, for it is sufficient if an acquittal of the one will show that the defendant could not have been guilty of the other.

Thus, a general acquittal of murder is a discharge upon an indictment of manslaughter upon the same person, because the latter charge was included in the former, and if it had so appeared on the trial the defendant might have been convicted of the inferior offense; and, on the other hand, an acquittal of manslaughter will preclude a future prosecution for murder, for,

States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State, — a riot, assault, or a murder,— and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other."

[45] 206 U. S. 333; 27 Sup. Ct. Rep. 749; 51 L. ed. 1084.

[46] The court refuses assent to the view that the accused had committed two distinct offenses —one against military law and discipline, the other against the civil law.

if he were innocent of the modified crime, he could not be guilty of the same fact, with the addition of malice and design." [47]

In Commonwealth v. Roby[48] the court say: "An acquittal on an indictment for murder will be a good bar to an indictment for manslaughter, and, *e converso,* an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder; for, in the first instance, had the defendant been guilty, not of murder, but of manslaughter, he would have been found guilty of the latter offense upon that indictment; and in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder." [49]

§ 424. What Constitutes Jeopardy.

What constitutes "jeopardy" is, in accordance with the general principle of constitutional construction, to be determined by the usage of the word and the custom of the common law at the time the Constitution was adopted. By the common law not only was a second punishment for the same offense prohibited, but a second trial forbidden whether or not the accused had suffered punishment, or had been acquitted or convicted.[50]

It is not necessary, in order that prior jeopardy may be pleaded in bar, that there should have been a former trial and verdict by a jury. This is not the rule uniformly stated, but as declared by the Supreme Court in Kepner v. United States,[51] "the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him: certainly so after acquittal." [52] "Undoubtedly," the court add, "in those jurisdiction where a trial of one accused of crime can only be by a jury, and a verdict of acquittal

[47] Vol. I, p. 452. Quoted with approval in Grafton v. United States.
[48] 12 Pick. (Mass.) 503.
[49] Citing Starkie, *Crim. Pl.*, 2d ed. 322.
[50] *Ex parte* Lange, 18 Wall. 163; 21 L. ed. 872.
[51] 195 U. S. 100; 24 Sup. Ct. Rep. 797; 49 L. ed. 114.
[52] Citing Coleman v. Tenn., 97 U. S. 509; 24 L. ed. 1118.

or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But protection being against a second trial for the same offense, it is obvious that where one has been tried before a competent tribunal having jurisdiction he has been put in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit." [53]

Where, upon a former trial, the jury has reported disagreement and, it appearing reasonably certain that an agreement cannot be obtained, the jury has been discharged by the court, a plea of former jeopardy will not be held good.[54]

In Hotema v. United States[55] it was held that a plea of former jeopardy to an indictment for murder could not be based upon the fact that, upon the trial of two consolidated indictments for two

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[53] Citing People v. Miner, 144 Ill. 308; State v. Bowen, 45 Minn. 145; State v. Layne, 96 Tenn. 668.

[54] In United States v. Perez (9 Wh. 579; 6 L. ed. 165), the court say: "We think that, in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion rests, in this as in other cases, upon the responsibility of the judges under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject in the American courts; but, after weighing the question with due deliberation, we are of opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial."

In Keerl v. Montana (213 U. S. 135; 29 Sup. Ct. Rep. 469; 53 L. ed. 734), the court, quoting the above, say: "This is the settled law of the federal courts since that time." Citing Logan v United States, 144 U. S. 263; 12 Sup. Ct. Rep. 617; 36 L. ed. 429; Thompson v. United States, 155 U. S. 271; 15 Sup. Ct. Rep. 73; 39 L. ed. 146; Dreyer v. Illinois, 187 U. S. 71; 23 Sup. Ct. Rep 28; 47 L. ed. 79.

[55] 186 U. S. 413; 22 Sup. Ct. Rep. 895; 46 L. ed. 1225.

other murders committed by the defendant on the same day as the one charged in the indictment in question, he was found not guilty because insane, which defense was again set up.

§ 425. Jeopardy and the Right of Appeal.

It is established that in criminal cases, the State has no right of appeal where the accused may fairly be said to have been placed in jeopardy. This, the doctrine of the common law, has been repeatedly accepted by the United States Supreme Court.[56] A verdict or a judgment in a trial court in favor of the accused is, therefore, as to him, final and conclusive. But acquittal before a court without jurisdiction is absolutely void and, therefore, no bar to a subsequent indictment and trial before a court having jurisdiction. The fact that an indictment was fatally defective does not render the judgment void, but voidable only. This the government could not set up on writ of error, and, of couse, the defendant would not. The judgment could not be collaterally attacked. Thus in United States v. Ball[57] the court say: "As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense."[58]

Where, upon conviction, the defendant has taken an appeal, and

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[56] See United States v. Sanges, 144 U. S. 310; 12 Sup. Ct. Rep. 609; 36 L. ed. 445, and authorities there cited.

[57] 163 U. S 662; 16 Sup. Ct. Rep. 1192; 41 L. ed. 300.

[58] In Kepner v. United States (195 U. S. 100; 24 Sup. Ct. Rep. 797; 49 L. ed. 114), this language is quoted and approved, the court adding: "It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict, and it was found upon a defective indictment. The protection is not . . . against the peril of second punishment, but against being tried for the same offense."

a new trial has been ordered, he may be found guilty of an offense of a higher degree than that originally found against him. Thus a verdict of manslaughter having been rendered, and appeal taken, and a new trial awarded, a verdict of murder may be returned. This is the doctrine definitely declared in Trono v. United States,[59] the court, after a review of authorities, saying: "We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it, and to ask for its reversal, he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense contained in the judgment which he has himself procured to be reversed."

As to the right of the defendant thus, by seeking a new trial, to waive the constitutional protection affored him by the first judgment the court admit that by seeking a new trial the accused may and does waive his right to the plea of former jeopardy as to the crime of which he has been convicted.[60] The only question is as to the extent of that waiver, and, the court say, it "seems much more rational and in better accord with the proper administration of the criminal law to hold that, by appealing, the accused waives the right to thereafter plead once in jeopardy, when he has obtained a reversal of the judgment, even as to that part of it which acquitted him of the higher while convicting him of the lower offense." The doctrine of Hopt v. Utah[61] does not, therefore, govern.[62]

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[59] 199 U. S. 521; 26 Sup. Ct. Rep. 121; 50 L. ed. 292.

[60] Citing United States v. Ball, 163 U. S. 662; 16 Sup. Ct. Rep. 1192; 41 L. ed 300.

[61] 110 U. S. 574; 4 Sup. Ct. Rep. 202; 28 L. ed. 262.

[62] It is to be observed in the Trono case four justices dissented, and Justice Holmes is recorded only as concurring in the result.

§ 426. The Constitutionality of Appeal by the Government in Criminal Cases.

In the dissenting opinion filed by Justices Holmes, White and McKenna, in Kepner v. United States,[63] it is argued that it is within the constitutional power of Congress to provide for a writ of error on behalf of the government in criminal trials, whereby errors of law committed in the trial court may be corrected, and, when proper, a new trial of the accused ordered. Though the verdict or judgment may have been in his favor upon the first trial, the accused, it is declared, is not, by the new trial, subjected to a second jeopardy. The jeopardy, it is argued, is one continuing jeopardy, from the beginning to the end of the cause. The principle of the immunity from second jeopardy in its origin, it is declared, was that a trial in a new and independent case could not be had where a man had already been once tried; not that he may not be tried twice in the same case. In fact, the argument continues, he may be tried a second time where the jury disagrees, or the verdict is set aside on the prisoner's bill of errors, or, indeed, he may be tried on a new indictment if the judgment on the first is arrested upon motion.[64]

Despite this argument, the weight of authorities, both state and federal, is overwhelming that, as stated earlier in this chapter, a verdict or judgment in a lower court of competent jurisdiction is final and conclusive as to the defendant. Provision has, however, been made in some of the States, and similar action has recently been taken by Congress, to provide for a review at the instance of the Government in a superior court of questions of law, with, however, the proviso that a verdict in favor of the defendant shall not be set aside. The objection, however, to such a proceeding is not only that it raises in the superior court merely moot questions, but that, irrespective of whether the superior courts will feel themselves bound or even constitutionally qualified to pass upon points with reference to which they are not able to issue any appropriate orders, there is the objection that the

[63] 195 U. S. 100; 24 Sup. Ct. Rep. 797; 49 L. ed. 114.

[64] *Ex parte* Lange, 18 Wall. 163; 21 L. ed. 872.

defendant having no reason for contesting them, the decisions will be based upon *ex parte* argument, with all the evils generally recognized as thereupon attending.[65]

The federal act referred to is that of March 2, 1909, which provides as follows: "That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded. From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded. From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy. The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases. Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided,* That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant." [66]

§ 427. Self-Incrimination: Immunity from, not a Requirement of Due Process of Law.

By the Fifth Amendment it is provided: "Nor shall any person be compelled, in any criminal case, to be a witness against himself." The guaranty thus furnished is one independent of the guaranty of "due process of law" and is thus one which, so far as the federal Constitution is concerned, is not secured to the individual in the state courts. After an elaborate consideration

[65] *Cf. Harvard Law Rev.*, XX, 219.

[66] 34 Stat. at L., Pt. I, 1246.

§ 428. Self-Incrimination: What Constitutes.

If the answer will tend merely to disgrace but not to incriminate the witness, the privilege does not apply. If, however, the answer is one which can have no bearing upon the case except to impair the credibility of the witness, he may refuse to answer.[69]

The immunity which is provided has for its object the protection of the individual against criminal prosecution based upon evidence which has been compulsorily obtained from him. Thus the provision is no bar to the use in a subsequent prosecution of evidence that has been voluntarily given by the accused; nor does it prevent the courts from compelling testimony with reference to acts no longer punishable, or where, by statute, subsequent use of the evidence so obtained in criminal actions has been forbidden. Thus also the immunity does not relate to evidence the tendency of which is merely to discredit the moral character of the witness.[70]

In Hale v. Henkel[71] the court declare the broad doctrine that the line is drawn at testimony that may expose the witness to criminal prosecution. "If the testimony relate to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon, or is guaranteed an immunity, the amendment does not apply. . . . The criminality provided against is a present, not a past criminality, which lingers only as a memory, and involves no present danger of prosecution."

§ 429. Right May Be Waived.

If the witness waives his privilege, and discloses his criminal connections, he may not stop, but must make a full disclosure of the facts regarding which he is interrogated.[72]

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[69] See authorities cited in Brown v. Walker, 161 U. S. 591; 16 Sup. Ct. Rep. 644; 40 L. ed. 819.

[70] The State authorities are in conflict as to this.

[71] 201 U. S. 43; 26 Sup. Ct. Rep. 370; 50 L. ed. 652.

[72] Brown v. Walker, 161 U. S. 591; 16 Sup. Ct. Rep. 644; 40 L. ed. 819, and authorities there cited.

§ 430. When Right May Be Claimed.

In 1807 in Burr's Trial[73] Chief Justice Marshall lays down the broad doctrine which has been generally acquiesced in, that where the witness avers under oath that the answer to the question which has been propounded to him will tend to incriminate him, no other testimony may be demanded by the court as to this fact. "If the question be of such a description that an answer to it may or may not incriminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not."

The fact that the immunity from prosecution afforded by a federal statute gives the witness no security from prosecution in the state courts as to matters regarding which he is asked to testify, is immaterial.[74]

§ 431. To Compel Testimony Statutory Immunity Must Be Complete.

Where the right to compel testimony is based upon a statute granting immunity from subsequent prosecution, the immunity granted must be complete. Absolute protection against later criminal actions for the offense to which the testimony relates must be provided. Thus in Counselman v. Hitchcock[75] the court held with reference to testimony before the Interstate Commerce Commission, that immunity granted by Section 860 of the Revised Statutes providing that "no evidence given by the witness shall be in any manner used against him in any court of the

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[73] Burr's Trial, 244.

[74] Brown v. Walker, 161 U. S. 591; 16 Sup. Ct. Rep. 644; 40 L. ed. 819. The converse of this, namely, that because the immunity granted by a state statute to prosecution does not extend to prosecutions in the federal courts the witness is not excused from testifying, is declared in Jack v. Kansas, 199 U. S. 372; 16 Sup. Ct. Rep. 73; 50 L. ed. 234. This doctrine is approved in Hale v. Henkel (201 U. S. 43; 26 Sup. Ct. Rep. 370; 50 L. ed. 652), the court saying: "Indeed, if the argument were a sound one, it might be carried still further and held to apply not only to state prosecutions within the same jurisdiction, but to prosecutions under the criminal laws of other States to which the witness might have subjected himself" The English doctrine is the same. See Wigmore on *Evidence*.

[75] 142 U. S. 547; 12 Sup. Ct. Rep. 195; 35 L. ed. 1110.

United States, in any criminal proceeding" was insufficient in that, while it did prohibit the use of the testimony which might be given, it did not prevent a subsequent prosecution of the witness for the offense regarding which he might have been compelled to testify. In order to correct this deficiency in the law, Congress, by act of February 11, 1893,[76] provided that, in the case designated, "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpœna."[77]

This law was upheld in Brown v. Walker.[78]

§ 432. Corporations not Protected Against Testimony by Their Agents.

In Hale v. Henkel[79] it was urged that while the immunity statute might protect the individual witness, it would not protect the corporation of which he was the agent and representative. To this the court answered that it was not the intention of the statute to do this nor was there a constitutional necessity that this should be done. The right guaranteed by the Fifth Amendment, it was declared, is purely a personal one of the witness. "It was not intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. . . . If he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation."

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[76] 27 Stat. at L. 443.

[77] "Provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

[78] 161 U. S. 591; 16 Sup. Ct. Rep. 644; 40 L. ed. 819. In Hale v. Henkel (201 U. S. 43; 26 Sup. Ct. Rep. 370; 50 L. ed. 652), a statute of February 25, 1903, was upheld which grants immunity with reference to prosecution under the Anti-Trust Act of 1890. The word "proceeding" as employed in the phrase of the statute that no one should be prosecuted, etc., on account of any testimony given in any "proceeding, suit or prosecution" under the acts enumerated, was held to include examinations before a grand jury.

[79] 201 U. S. 43; 26 Sup. Ct. Rep. 370; 50 L. ed. 652.

§ 433. Private Books and Papers.

The immunity of the individual from compulsory self-incrimination includes the right to refuse to produce private books and papers which will have, or will tend to have, this effect.[80] But it does not permit him, as an officer of a corporation, to refuse to produce its books and papers when the corporation is charged with a violation of a statute by the State of its creation or of a State in which it is doing business or of an act of Congress.[81]

§ 434. Unreasonable Searches and Seizures.

The question as to the right of the government to compel the production of books and papers is closely connected with the provision of the Fourth Amendment with reference to unreasonable searches and seizures.

The provision of the Fourth Amendment that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," has received comparatively little direct interpretation and application at the

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[80] Boyd v. United States, 116 U. S. 616; 6 Sup. Ct. Rep. 524; 29 L. ed. 746. Bocks and papers of a defendant obtained otherwise than through his own hand may be used against him, and this even though they may have been obtained by illegal means. Adams v. New York, 192 U. S. 585; 24 Sup. Ct. Rep. 372; 48 L. ed. 575.

[81] "The corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It has certain special privileges or franchises, and holds them subject to the laws of the States of the limitations of its charter. . . . Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. . . . It is true that the corporation in this case was chartered under the laws of New Jersey . . . but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce. . . . The powers of the General Government in this particular in the vindication of its own laws are the same as if the corporation had been created by act of Congress." Hale v. Henkel, 201 U. S. 43; 26 Sup. Ct. Rep. 370; 50 L. ed. 652. See also Consolidated Rendering Co. v. Vermont, 207 U. S. 541; 28 Sup. Ct. Rep. 178; 52 L. ed. 327.

hands of the Supreme Court. In *Ex parte* Jackson[82] it was held that the Amendment applies to sealed papers in the mails.[83]

§ 435. Corporations Protected.

In Hale v. Henkel[84] the court, while refusing to hold that corporations are protected by the Fifth Amendment from incrimination by the compulsorily obtained papers and testimony of their agents, go on to say that they are not to be understood as declaring that corporations are not granted immunity from unreasonable searches and seizures, and that a judicial order for the production of books and papers may in certain cases constitute an unreasonable search or seizure. And in the case at bar, the subpœna *duces tecum* was held too sweeping in its terms to be deemed reasonable.

§ 436. Boyd v. United States.

The most careful consideration which the Fourth Amendment has received by the Supreme Court is that contained in the opinion rendered in the case of Boyd v. United States.[85]

In this case the intimate relation between the Fourth Amendment and that clause of the Fifth which prohibits the accused from being compelled to be a witness against himself, is emphasized. "We have been unable to perceive," say the court, "that the seizure of a man's private books and papers to be used against him is substantially different from compelling him to be a witness against himself." "We are also of opinion," the court continue, "that

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proceedings instituted for the purpose of declaring the forfeiture

[82] 96 U. S. 727; 24 L. ed. 877.

[83] "The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the Fourth Amendment of the Constitution."

[84] 201 U. S. 43; 26 Sup. Ct. Rep. 370; 50 L. ed. 652.

[85] 116 U. S. 616; 6 Sup. Ct. Rep. 524; 29 L. ed. 746.

of a man's property by means of offenses committed by him, though they may be civil in form, are in their nature criminal" and thus brought within the operation of the Fourth Amendment and that part of the Fifth which relates to self-incrimination.

In this case the court held void the provisions of a customs revenue law of Congress of 1874, which authorized the courts, on motion of the government, to require the defendant to produce his private books and papers, and in case of his refusal so to do, declared that the allegations of the government were to be held as confessed. This was held repugnant to both the Fourth and Fifth Amendments.[86]

§ 437. Cruel and Unusual Punishments.

The provision of the Eighth Amendment that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and

[86] For further discussion of the Fourth Amendment see the article of A. A. Bruce, "Arbitrary Searches and Seizures" in *The Greenbag*, XVIII, 273, 1906. The general law relating to the issuance of search warrants is excellently stated by Cooley in the *Constitutional Limitations* (7th ed., 429), as follows: "In the first place they are only to be granted in the cases expressly authorized by law; and not generally in such cases until after a showing made before a judicial officer, under oath, that a crime has been committed, and that the party complaining has reasonable cause to suspect that the offender, or the property which was the subject or instrument of the crime, is concealed in some specified house or place. And the law, in requiring a showing of reasonable cause for suspicion, intends that evidence shall be given of such facts as shall satisfy the magistrate that the suspicion is well founded; for the suspicion itself is no ground for the warrant except as the facts justify it. In the next place, the warrant which the magistrate issues must particularly specify the place to be searched and the object for which the search is to be made. . . . The warrant is not allowed for the purpose of obtaining evidence of an intended crime; but only after lawful evidence of an offense actually committed. Nor even then is it allowable to invade one's privacy for the sole purpose of obtaining evidence against him, except in a few special cases where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruction. Those special cases are familiar, and well understood in the law. Search-warrants have heretofore been allowed to search for stolen goods, for goods supposed to have been smuggled into the country in violation of the revenue laws, for implements of gaming or counterfeiting, for lottery tickets or prohibited liquors kept for sale contrary to law, for obscene books or papers kept for sale or circulation, and for powder or other explosives and dangerous material so kept as to endanger the public safety.

unusual punishments inflicted" has given rise to few adjudications in the Supreme Court.

The prohibitions are not included within "due process of law," and are not, therefore, made applicable by the Fourteenth Amendment to the States.[87]

The fact that the method of administering the death penalty, for example, by electrocution, is new, does not bring it within the constitutional prohibition, unless it also inflicts what amounts to lingering torture. "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." [88]

The infliction of a heavier penalty upon a person convicted of felony who has before been convicted of felony, is not the imposition of a cruel and unusual punishment.[89]

In the case of Weems v. United States decided May 2, 1910, is probably the most interesting discussion which the prohibition of cruel and unusual punishments has received by the Supreme Court. The report of this case has come to hand too late for an adequate presentation here of the points or reasoning involved. It may, however, be said that the case is significant, or potential

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A statute which should permit the breaking and entering a man's house, and the examination of books and papers with a view to discover the evidence of crime, might possibly not be void on constitutional grounds in some other cases; but the power of the legislature to authorize a resort to this process is one which can properly be exercised only in extreme cases, and it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons,—and all this under the direction of a mere ministerial officer, who brings with him such assistants as he pleases, and who will select them more often with reference to physical strength and courage than to their sensitive regard to the rights and feelings of others. To incline against the enactment of such laws is to incline to the side of safety."

[87] *Ex parte* Kemmler, 136 U. S. 436; 10 Sup. Ct. Rep. 930; 34 L. ed. 519.

[88] *Ex parte* Kemmler, 136 U. S. 436; 10 Sup. Ct. Rep. 930; 34 L. ed. 519. See also Wilkerson v. Utah, 99 U. S. 130; 25 L. ed. 345.

[89] McDonald v. Massachusetts, 180 U. S. 311; 21 Sup. Ct. Rep. 389; 45 L. ed. 542.

authority; and, third, as to both the foregoing it operated to restrain the lawmaking power from endowing the judiciary with the right to exert an illegal discretion as to the kind and extent of punishment to be inflicted."

§ 438. Treason.

The power of Congress with reference to both the definition and punishment of treason is limited by Section III of Article III of the Constitution. The three clauses of this section provide as follows:

"Treason against the United States shall consist in levying war against them, in adhering to their enemies, giving them aid and comfort."

"No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court."

"The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted." [90]

The purpose of these provisions is to exclude the possibility of the Federal Government, through either its judicial or legislative branches, following the precedents of English law and practice, and declaring a great variety of acts to constitute treason and punishable as such.

Following in the main the words of the Constitution Congress has by statute declared that "whoever, owing allegiance to the United States levies war against them, or adheres to their enemies giving them aid and comfort within the United States or elsewhere, is guilty of treason." [91]

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[90] Art. III, Sec. III.

[91] 35 Stat. at L., chap. 321, p. 1088, § 1. The phraseology of section 5331 of the Rev. Stat. is here slightly changed. By section 2, the punishment for treason is fixed at death, or, at the discretion of the court, imprisonment at hard labor for not less than four years, and a fine of not less than ten thousand dollars, and disqualification from holding office under the United States.

§ 439. May Be Committed by Aliens.

Treason is a breach of allegiance, and it will be observed that the statute restricts the definition of the offense to persons owing allegiance to the United States.

This allegiance may be one of full citizenship, or one based upon the presence of an alien, and the commission of the treasonable act, within the territorial limits of the United States. In an earlier chapter it has been pointed out that an alien within the territorial limits of a State, whether domiciled there or not, owes for the time being a qualified allegiance to that State. He enjoys the protection of its laws, and may be guilty of treason if he wages war against or gives comfort or aid to the enemies of that sovereignty.[92]

In Radich v. Hutchins[93] the court say: "If at the time the transaction took place, which has given rise to the present action, the plaintiff was a subject of the Emperor of Russia, as he alleges, that fact cannot affect the decision of the case, or any question presented for our consideration. He was then a resident of the State of Texas, and engaged in business there. As a foreigner domiciled in the country, he was bound to obey all the laws of the United States not immediately relating to citizenship, and was equally amenable with citizens to the penalties prescribed for their infraction. He owed allegiance to the government of the country so long as he resided within its limits, and can claim no exemption from the statutes passed to punish treason, or the giving of aid and comfort to the insurgent States. The law on this subject is well settled and universally recognized."

§ 440. Domicile not Necessary.

In this case the alien was domiciled in the United States, but it would not appear that domiciliation is necessary as a basis for holding the alien liable for treason, if the act of treason be committed within the territorial jurisdiction of the United States.

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[92] Carlisle v. United States, 16 Wall. 147; 21 L. ed. 426; Radich v. Hutchins, 95 U. S. 210; 24 L. ed. 409.

[93] 95 U. S. 210; 24 L. ed. 409.

If the act be committed by the alien outside of such jurisdiction, no treason can be alleged.[94]

§ 441. No Distinction in United States between High and Petit Treason.

The distinction between "high" and "petit" treason is not known to American constitutional law.[95] Or rather, under our law, petit treason no longer exists. It is now simply murder.

§ 442. Misprision of Treason.

Misprision of treason is defined and its punishment provided for by Section 5333 of the Revised Statutes.[96]

The constitutionality of this provision was considered and not questioned in United States v. Wiltberger.[97]

§ 443. What Constitutes Treason.

By the definition of the Constitution treason to the United States may be charged only in cases where the accused has levied war against the United States, adhered to its enemies, or given them aid and comfort; and, for conviction, there must have been an overt act.

The distinction between a mere riot, or resistance to the execution of a law, and treason is not always easy to draw, but in general the authorities hold that the resistance to public authority, in order to constitute a levying of war and, therefore, treason, must amount to an effort directly to overthrow the government, or to

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[94] United States v. Villato, 2 Dall. 370; 1 L. ed. 419.

[95] Statute 25 Edw. III defines petit treason as the killing of a husband by a wife, of a master by his servant, or of a prelate by an ecclesiastic owing obedience to him.

[96] "Whoever owing allegiance to the United States and having knowledge of the commission of any treason against them, conceals, and does not, as soon as may be, disclose and make known the same to the President, or to some judge of the United States, or to the governor, or to some judge or justice of a particular State, is guilty of misprision, and shall be imprisoned not more than seven years, and fined not more than one thousand dollars." Sec. 2, Chap. 321, 35 Stat. at L. 1088, Act March 2, 1909.

[97] 5 Wh. 76; 5 L. ed. 37.

levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war. Crimes so atrocious as those which have for their object the subversion by violence of those laws and institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our Constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act, or on confession in open court, must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is, therefore, more safe as well as more consonant to the principles of our Constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide. To complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design. In the case now before the court, a design to overturn the government of the United States in New Orleans by force, would have been unquestionably a design which, if carried into execution, would have been treason, and the assemblage of a body of men for the purpose of carrying

it into execution would amount to levying of war against the United States; but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war." [2]

[2] In Homestead Treason Case (1 Dist. Rep. [Pa.] 785), the court, charging the jury, say: "When a large number of men arm and organize themselves by divisions and companies, appoint officers, and engage in a common purpose to defy the law and resist its officers, and to deprive any portion of their fellow-citizens of the right to which they are entitled under the Constitution and the laws, it is a levying of war against the State, and the offense is treason. Much more so when the functions of the state government are usurped in a particular locality, the process of the Commonwealth and the lawful acts of its officers resisted, and unlawful arrests made at the dictation of a body of men, who have assumed the functions of government in that locality. It is a state of war when a business plant has to be surrounded by the army of the State for weeks to protect it from unlawful violence at the hands of men formerly employed in it. Where a body of men have organized for a treasonable purpose, every step taken is an overt act of treason in levying war."

Justice Story in a charge to the jury in the United States Circuit Court, in 1842 (1 Story, 615), said: "A conspiracy to levy war, and an actual levy of war, are distinct offenses. To constitute an actual levy of war, there must be an assembly of persons met for the treasonable purpose, and some overt act done, or some attempt made by them with force to execute, or towards executing, that purpose. There must be a present intention to proceed in the execution of the treasonable purpose by force. The assembly must now be in a condition to use force, and must intend to use it, if necessary, to further, or to aid, or to accomplish the treasonable design. If the assembly is arrayed in a military manner, if they are armed and march in a military form, for the express purpose of overawing or intimidating the public, and thus they intend to carry into effect the treasonable design, that will, of itself, amount to a levy of war, although no actual blow has been struck, or engagement has taken place." And further, "In respect to the treasonable design, it is not necessary that it should be a direct and positive intention entirely to subvert or overthrow the government. It will be equally treason, if the intention is by force to prevent the execution of any one or more general and public laws of the government in its sovereign capacity. Thus, if there is an assembly of persons with force, with intent to prevent the collection of the lawful taxes or duties levied by the government, or to destroy all custom-houses or to resist the administration of justice in the courts of the United States, and they proceed to execute their purpose by force, there can be no doubt that it would be treason against the United States. . . . If the object of an assembly of persons, met with force, is to overturn the government or constitution of a State, or to prevent the due exercise of its sovereign powers, or to resist the execution of any one or more of its general laws, but without any intention whatsoever to intermeddle with the relations of that State with the National

The fact that rebels have been recognized by the government as "belligerents" does not deprive that government of constitutional power to treat them, when captured, as traitors.

§ 445. Treason Against a State of the Union.

The punishment of the crime of treason against the United States is placed exclusively within the control of the federal authorities. Treason against an individual State of the Union, however, is punishable by the authorities of the State, which authorities have, subject to the general limitations placed upon them by the federal Constitution with reference to due process of law, *ex post facto* legislation, etc., the powers to determine what acts shall be held to constitute treason against the State.

§ 446. Offenses, Other than Treason, Against the Existence and Operations of the Federal Government.

The Federal Government, though restrained by the Constitution, with reference to the definition of treason, has the general power to define and punish as it sees fit all acts against its existence or undisturbed operation. Thus it has by statute defined

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Government, or to displace the national laws or sovereignty therein, every overt act done with force towards the execution of such a treasonable purpose is treason against the State only. But treason may be begun against a State, and may be mixed up or merged in treason against the United States. Thus, if the treasonable purpose be to overthrow the government of the State, and forcibly to withdraw it from the Union, and thereby to prevent the exercise of the national sovereignty within the limits of the State, that would be treason against the United States. So, if the troops of the United States should be called out by the President, in pursuance of the duty enjoined by the Constitution, . . . and there should be an assembly of persons with force to resist and oppose the troops so called out by the President, that would be a levy of war against the United States although the primary intention of the insurgents may have been only the overthrow of the state government or the state laws."

For further definitions of what constitutes "adhering to their enemies," and "giving them aid and comfort," see United States v. Burr, 2 Burr's Trial, 405; United States v. Pryor, 3 Wash. 234; United States v. Greathouse, 2 Abb. C. C. 364; United States v. Greiner, 4 Phila. 396; Wharton State Trials, 102*ff*.

and provided punishment for misprision of treason, inciting or engaging in rebellion or insurrections, criminal correspondence with foreign governments, seditious conspiracy, recruiting soldiers or sailors to serve against the United States, enlistment to serve against the United States, and generally, acts which interfere with the effective operations of the government.[3]

Whether, and to what extent, Congress has the power to punish seditious libels will be considered in the section dealing with Freedom of Speech and Press.[4]

§ 447. Jury Trial in Civil Suits.

By the Seventh Amendment it is provided that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

This provision, it has been determined by the Insular Cases, does not apply *ex proprio vigore* to the unincorporated Territories.

Trial by jury, as used in this provision, refers to "a jury of twelve men, in the presence of and under the superintendence of a judge empowered to instruct them in the law and to advise them on the facts, and to set aside their verdict if, in his opinion, it is against the law and the evidence." The "rules of common law," refer, of course, to the common law of England, which permit a new trial, granted by the trial court or by an appellate court for errors in law committed on the first trial.[5]

In Capital Traction Co. v. Hof it was held that the right to jury is preserved, when an appeal, on giving bond, is allowed from a judgment of a justice of the peace to a court of record, where trial is had by jury. The constitutional provision, it is

[3] See §§ 1–8 and 27–84, of Act of March 4, 1909, codifying, revising, and amending the penal laws of the United States, 35 Stat. at L. 1088.

[4] As to the constitutional power of Congress to afford special protection to the President, and to punish acts of violence committed against him, see House Rpt. 1422, 57th Cong., 1st Sess.

[5] Capital Traction Co. v. Hof, 174 U. S. 1; 19 Sup. Ct. Rep. 580; 43 L. ed. 873.

pointed out, does not prescribe at what stage of an action a trial by jury must, if demanded, be had, or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it. After a careful review of the practice in the States at the time of the adoption of the Constitution, and since, the court hold that the provision of an act of Congress requiring every appellant from the judgment of a justice of the peace in the District of Columbia to give security to pay and satisfy the judgment of the appellate court is consistent with that preservation of the right of trial by jury required by the Seventh Amendment.[6]

§ 448. Waiver of Jury in Civil Cases.

The right to a jury trial in civil cases, whatever the value in controversy, may be waived. No objection to a waiver was made in the early case of Parsons v. Armor;[7] nor later in Bamberger v. Terry;[8] nor in Supervisors of Wayne Co. v. Kennicott.[9] Indeed the right to waive has not been seriously questioned.

§ 449. Religious Freedom.

The provision of the First Amendment that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," has given rise to comparatively little litigation in the federal courts.[10]

In Reynolds v. United States[11] the meaning of the prohibition is carefully considered and the conclusion, unavoidable from a practical viewpoint, reached that the prohibition does not prevent Congress from penalizing the commission of acts which, though justified by the tenets of a religious sect, are socially or

[6] 174 U. S. 1; 19 Sup. Ct. Rep. 580; 43 L. ed. 873.

[7] 3 Pet. 413; 7 L. ed. 724.

[8] 103 U. S. 40; 26 L. ed. 317.

[9] 103 U. S. 554; 26 L. ed. 486.

[10] By Clause 3 of Article VI it is also provided that "no religious test shall ever be required as a qualification to any office or public trust under the United States."

[11] 98 U. S. 145; 25 L. ed. 244.

politically disturbing, or are generally reprobated by the moral sense of civilized communities. Thus, in this case, it was held that polygamy might be declared illegal and criminal, though declared proper and even meritorious by the Mormon Religion.

In Davis v. Beason[12] the subject was again considered, the court saying: "It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his beliefs on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."

Under provisions of the state constitutions prohibiting the creation of state religious establishments, the appropriations of money for sectarian purposes, and in general the infringement of religious liberty and equality, many cases have arisen in which American doctrines of Church and State have been discussed. A consideration of these cases will not be appropriate in this treatise, but it may be said that a peculiarly valuable examination of the doctrines governing the attitude of the courts in dealing with property claimed by two or more contesting religious bodies, is that contained in the opinion of the Supreme Court in Watson v. Jones.[13]

§ 450. Freedom of Speech and Press.

The prohibition laid upon Congress by the First Amendment that it shall make no law "abridging the freedom of speech, or of the press" has given rise to very few pronouncements by the Supreme Court, and in no instance, indeed, has the constitu-

[12] 133 U. S. 333; 10 Sup. Ct. Rep. 299; 33 L. ed. 637.
[13] 13 Wall. 679; 20 L. ed. 666.

tionality of an act of Congress been seriously questioned upon this ground before that tribunal.

In United States v. Williams[14] the provision of the Immigration Act of March 3, 1903, for the exclusion of aliens holding anarchistic beliefs was indeed questioned on the ground that freedom of speech and press was infringed, but the court dismissed the point with the observation that while it is true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled therefrom, he is cut off from speaking or publishing in this country, yet the right freely to speak or publish is not infringed, for the one claiming the right "does not become one of the people to whom these things are secured by our Constitution by an attempt to enter, forbidden by law." The question thus became simply one of the right to exclude. As to this the court had no doubt in the premises of the power of Congress.

In *Ex parte* Jackson[15] the court after holding that sealed matter in the mails may not be opened and examined, except upon a proper search warrant, go on to observe that as to printed unsealed matter, their transportation in the mails may not be so interfered with as to violate the freedom of the press, because unfettered circulation of printed matter is as essential to the freedom of the press as is the liberty of printing. Therefore, it is declared, if printed matter be excluded from the mails, its transportation in other ways may not be forbidden by Congress.[16]

And in *Ex parte* Rapier[17] the court say with reference to the exclusion of lottery tickets, and advertisements thereof from the

[14] 104 U. S. 279; 24 Sup. Ct. Rep. 719; 48 L. ed. 979.

[15] 96 U. S. 727; 24 L. ed. 877.

[16] "Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value. If, therefore, printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress."

[17] 143 U. S. 110; 12 Sup. Ct. Rep. 374; 36 L. ed. 93.

mails: "The circulation of newspapers is not prohibited, but the government declines to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matter condemned by its judgment, through the government agencies which it controls."

The main purpose of the constitutional provisions of the First Amendment has been declared to be "to prevent all such previous restraints upon publications as had been practised by other governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[18] In the case in which this doctrine is declared, the court held unfounded the claim of a right under the First Amendment to prove the truth of statements contained in certain publications which had by the lower court been held to constitute a contempt of the court.

It would thus appear that the prohibition of the First Amendment relative to the abridgment of freedom of speech or press not only leaves to the federal courts the authority to grant relief to persons libeled or slandered, and to punish for contempt the publication or utterance of statements reflecting upon its own dignity or calculated to interfere with the proper and efficient administration of justice and the execution of its writs, but that it preserves, or at least does not restrict the power of Congress to declare criminal and provide punishment for the publication or open advocation of doctrines or practices calculated to destroy or interfere with the exercise of its constitutional powers.

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[18] Patterson v. Colorado, 205 U. S. 454; 27 Sup. Ct. Rep. 556; 51 L. ed. 879, citing Com. v. Blanding, 3 Peck, 304; Respublica v. Oswald, 1 Dall. 319. Justice Harlan dissenting, says, "I cannot assent to that view, if it be meant that the legislature may impair or abridge the rights of a free press and of free speech wherever it thinks that the public welfare requires that to be done."

§ 451. Seditious Libel.

Thus it would seem beyond question that Congress may define and punish seditious libel, provided the prohibition extends to acts which clearly tend to sedition. The famous Sedition Act of 1798, never came before the Supreme Court, but was upheld as constitutional by three federal judges;[19] and by those criticising it, the argument rather was that the act was too broad, than that seditious libel, properly defined, might not be punished.[20]

§ 452. The Right Peaceably to Assemble and Petition.

By the First Amendment the right of the people is guaranteed "peaceably to assemble, and to petition the government for redress of grievances." Almost the only discussion of this provision by the Supreme Court is that contained in the opinion in United States v. Cruikshank[21] in which it is said: "The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In

[19] Trial of Matthew Lyon, Wharton's St. Trial, 333; Trial of Thomas Cooper, Ibid. 569; Trial of J. F. T. Callender, Ibid. 688; Trial of Anthony Haswell, Ibid. 684.

[20] The act of 1798 (July 14) provided: "If any person shall write, print, utter, or publish . . . any false, slanderous, and malicious writing or writings against the government of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either of them, the hatred of the good people of the United States, or to excite any unlawful combinations therein for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the Constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage, or abet any hostile designs of any foreign nation against the United States, their people or government," such person shall, on being convicted, be punished, etc. The questionable feature of this law is thus seen to be that it declares criminal not only publications which are seditious, but those which defame the government or its chief officials. For an excellent discussion of this law, as well as of the general subject of seditious libel, see the article "The Jurisdiction of the United States over Seditious Libel" by Mr. Biklè in *The American Law Register*, Vol. L, 1 (Jan. 1902).

[21] 92 U. S. 542; 23 L. ed. 588.

fact, it is and always has been one of the attributes of citizenship under a free government. It 'derives its source' to use the language of Chief Justice Marshall in Gibbons v. Ogden (9 Wh. 1, 6 L. ed. 23) 'from those laws whose authority is acknowledged by civilized man throughout the world.' It is found wherever civilization exists. It is not, therefore, a right granted to the people of the Constitution. The government of the United States found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains, according to the ruling in Gibbons v. Ogden, subject to state jurisdiction. The particular Amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the Amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States."

The court go on to observe, however, that: "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of and guaranteed by the United States."

§ 453. The Right to Bear Arms.

By the Second Amendment it is provided that "a well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."

In Presser v. Illinois[22] was questioned the constitutionality of a section of the military code of a State forbidding bodies of men to associate together or parade or drill with arms in cities and towns unless authorized by law. The court, however, held that so far as the Second Amendment to the federal Constitution was concerned, there was no objection to this provision for the

[22] 116 U. S. 252; 6 Sup. Ct. Rep. 580; 29 L. ed. 615.

reason that the amendment, like the other of the first eight amendments, applies only to the Federal Government. But it was, however, also objected that the statute was inconsistent with, or at least that it attempted to cover ground already covered by, congressional legislation with reference to the organization and control of the federal militia. As to this the court said: "It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the Federal Government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government. But . . . we think it clear that the sections under consideration do not have this effect."[23]

[23] It was also argued that the sections of the state law in question were in violation of the Fourteenth Amendment, in that they deprived persons of the enjoyment of a privilege or immunity belonging to them as citizens of the United States. To this the court replied: "We have not been referred to any statute of the United States which confers upon the plaintiff in error the privilege which he asserts. The only clause in the Constitution which, upon any pretense, could be said to have any relation whatever to his right to associate with others as a military company, is found in the First Amendment, which declares that 'Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble and to petition the government for a redress of grievances. The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without and independent of an Act of Congress or law of the State authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and Federal Governments, acting in due regard to their respective prerogatives and powers. The Constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject. It cannot be successfully questioned that the state governments, unless restrained by their own constitutions, have the power to regulate or prohibit associations and meetings of the

§ 454. The Quartering of Troops.

The provision of the Third Amendment that "no soldier shall in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law," requires little explanation, and has received practically none by the Supreme Court.

§ 455. Slavery and Involuntary Servitude.

The prohibition of the Thirteenth Amendment is absolute upon the States and Federal Government alike that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." [24]

By section 2 of the amendment Congress is given the power to enforce this prohibition by appropriate legislation.

§ 456. Enforcement Clause of the Thirteenth Amendment.

It is to be observed that whereas the Fourteenth Amendment has for its aim the protection of citizens against action on the part of the States, and that, therefore, the legislative power of Congress under its enforcement clause is limited to the prevention or punishment of the prohibited acts on the part of the States, the Thirteenth Amendment absolutely prohibits the existence of the

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people, except in the case of peaceable assemblies to perform the duties or exercise the privileges of citizens of the United States; and have also the power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations are authorized by the militia laws of the United States. The exercise of this power by the States is necessary to the public peace, safety and good order. To deny the power would be to deny the right of the State to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine."

[24] Justices Brown and White in the Insular Cases refer to the phraseology of the Amendment as evidencing that the conception was held that there might be territory subject to the jurisdiction but not a part of the United States. It would appear, however, from the records of the time, that no such significance was attached to the last clause of section 1 of the Amendment. *Cf.* Address of C. E. Littlefield before the American Bar Association. Reports of, XXIV, 280*ff*.

institution or fact of slavery or involuntary servitude, and the enforcement clause, therefore, gives to the General Government the power to punish the individual or individuals, whether private persons or state officials who hold, or attempt to hold, anyone in slavery or involuntary servitude.

Pursuant to the power thus given Congress has, by various acts, declared criminal and provided punishment for those persons violating the constitutional provision.[25]

In Clyatt v. United States,[26] upholding the constitutionality of these measures, the court observe that the amendment denounces a status or condition irrespective of the manner in which or authority by which created, and that though self-executing without ancillary legislation so far as its laws are applicable in existing circumstances, "legislation may be necessary and proper to meet all the various cases and circumstances affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character."[27] In this respect it is especially pointed out that the Thirteenth differs from the Fourteenth Amendment.

This legislative power of Congress does not, however, extend to the prohibition and punishment of acts which do not in themselves amount to a holding of one in slavery or involuntary servitude, but are acts which infringe the freedom of another. Thus in Hodges v. United States[28] was sustained a demurrer to an indictment in a federal court, on the ground of lack of jurisdiction, which indictment charged the accused with compelling certain negro citizens, by intimidation and force, to desist from performing their contracts of employment.[29]

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[25] See chapter 10 of Act of March 4, 1909, codifying, revising, and amending the federal laws of the United States. 35 Stat. at L. 1138.

[26] 197 U. S. 207; 25 Sup. Ct. Rep. 429; 49 L. ed. 726.

[27] This language is substantially quoted from the opinion in the Civil Rights Cases, 109 U. S. 3; 3 Sup. Ct. Rep. 18; 27 L. ed. 835.

[28] 203 U. S. 1; 27 Sup. Ct. Rep. 6; 51 L. ed. 65.

[29] The indictments were brought under sections 1977 and 5508 of the Revised Statutes. These sections read. "§ 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to

To the argument that one of the *indicia* of slavery is the lack of power to make or perform contracts, and that by the acts of the accused this disability had been brought about and the negroes thus *pro tanto* reduced to a condition of slavery, the court replied that practically every wrong done to another has this result, and to concede the claim of counsel would be to place the punishment of all acts of personal wrong or duress within the power of the Federal Government.[30]

§ 457. Involuntary Servitude: Peonage.

The Thirteenth Amendment had, of course, for its chief purpose, the abolition of negro slavery. But this was not the sole purpose. Its terms were purposely made broad enough to exclude not only the slavery of any person, whatever his race or color, but his involuntary servitude save as a punishment for crime.[31] It has thus become necessary for the courts to pass upon the constitutionality of various forms of compulsory service which, while

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the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." "§ 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured,— they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office or place of honor, profit, or trust created by the Constitution or laws of the United States."

[30] Justices Harlan and Day dissenting.

[31] "Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the 13th article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so, if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply though the party interested may not be of African descent." Slaughter House Cases, 16 Wall. 36; 21 L. ed. 394.

not amounting to slavery, have been alleged to constitute involuntary servitude or peonage.[32]

In the Slaughter House Cases[33] it was alleged that the grant of exclusive slaughtering rights to a corporation, and the consequent compulsion upon individuals to resort to that corporation for the slaughtering of live stock, created a state of involuntary servitude. After a review of the circumstances leading up to the adoption of the *post bellum* amendments the court, while admitting that "the word 'servitude' is of larger meaning than slavery as the latter is popularly understood in this country," decline to extend that meaning so as to include the obligation of the citizen to conform to a requirement of law which, as the court go on to hold, is a legitimate exercise of the States' police powers.

In the Civil Rights Cases[34] it was held that the denial to persons of admission to the accommodations and privileges of an inn, a public conveyance or a theater, does not subject him to involuntary servitude "or tend to fasten upon him any badge of slavery," and that, therefore, Congress had no power under the enforcement clause of the Thirteenth Amendment to provide for the punishment of individuals convicted of this denial. The authority given to Congress by the Thirteenth Amendment was declared to be not the power "to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery." "Mere discriminations on account of race or color were not regarded as the badge of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth Amendment, which merely abolishes slavery, but by force of the Fourteenth and Fifteenth Amendments."[35]

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[32] The holding or returning of persons to peonage has been declared criminal by act of Congress. §§ 269, 270, Act of March 4, 1909.

[33] 16 Wall. 36; 21 L. ed. 394.

[34] 109 U. S. 3; 3 Sup. Ct. Rep. 18; 27 L. ed. 835.

[35] Justice Harlan dissented. "I do not contend," he says, "that the Thirteenth Amendment invests Congress with authority by legislation, to define

In Plessy v. Ferguson[36] in which the attempt was made to have declared void as contrary to the Thirteenth Amendment a law of a State requiring separate accommodations for white and colored persons on the railroads, the court say: "That it does not conflict with the Thirteenth Amendment . . . is too clear for argument. . . . A statute which implies merely a legal distinction between the white and colored races — a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude. Indeed we do not understand that the Thirteenth Amendment is strenuously relied upon by the plaintiff in error in this connection." [37]

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and regulate the entire body of the civil rights which citizens enjoy, or may enjoy, in the several States. But I hold that since slavery, as the court has repeatedly declared, was the moving or principal cause of the adoption of that amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against them because of their race, in respect of such civil rights as belong to freemen of other races."

[36] 163 U. S. 537; 16 Sup. Ct. Rep. 1138; 41 L. ed. 256.

[37] Notwithstanding the opinion of the majority of the court that the question was one not open to argument, Justice Harlan vigorously dissented and declared that the judgment would in time prove as pernicious as the decision in the Dred Scott Case. The Thirteenth Amendment, he declared, "not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude." To the argument that the act in question did not discriminate between the races, that what it forbade to the one, it forbade to the other, he said: "But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons." And he continued: "It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from travelling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a State can prescribe as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so

§ 458. Seamen.

In Robertson v. Baldwin[38] the court upheld certain provisions of the Revised Statutes providing for the apprehension of deserting seamen, and the compulsory fulfilment by them of their contracts, as not in violation of the Thirteenth Amendment.[39]

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regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of the street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road or street? Why may it not require sheriffs to assign whites to one side of a court-room and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?"

[38] 165 U. S. 275; 17 Sup. Ct. Rep. 326; 41 L. ed. 715.

[39] In its opinion the court say: "The question whether Sections 4598 and 4599 conflict with the Thirteenth Amendment, forbidding slavery and involuntary servitude, depends upon the construction to be given to the term 'involuntary servitude.' Does the epithet 'involuntary' attach to the word 'servitude' continuously, and make illegal any service which becomes involuntary at any time during its existence; or does it attach only at the inception of the servitude, and characterize it as unlawful because unlawfully entered into? If the former be the true construction, then no one, not even a soldier, sailor, or apprentice, can surrender his liberty even for a day; and the soldier may desert his regiment upon the eve of battle, and the sailor abandon his ship at any intermediate port or landing, or even in a storm at sea, provided only he can find means of escaping to another vessel. If the latter, then an individual may, for a valuable consideration, contract for the surrender of his personal liberty for a definite time and for a recognized purpose, and subordinate his going and coming to the will of another during the continuance of the contract. . . . Not that all such contracts would be lawful, but that a service which was knowingly and willingly entered into could not be termed involuntary. Thus if one should agree, for a yearly wage, to serve another in a particular capacity during his life, and never to leave his estate without his consent, the contract might not be enforceable for the want of a legal remedy, or might be void upon the grounds of public policy, but the servitude could not be properly termed involuntary. Such agreements for a limited personal servitude at one time were very common in England, and by statute of June 27, 1793 (4 Geo. IV, chap. 34, § 3) it was enacted that if any servant in husbandry or any artificer, calico printer, hands-craftsman, miner, collier, keelman, pitman, glassman, potter, laborer, or other person, should contract to serve another for a definite time, and should desert such service during the term of the contract, he was made liable to a criminal punishment.

§ 459. Contracts for Personal Services: Enforcement of.

The Thirteenth Amendment renders unenforceable contracts for personal services, suits for damages in cases of breaches of such contracts being the only remedy left the ones to whom such services have been promised. A more doubtful question is as to the power of the States or of the United States to provide punishment for the breach of contracts for personal services. Various cases have been decided in the state and federal courts with reference to this point. In general it may be said that the doctrine is established that statutes making criminal the mere breach of

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The breach of a contract for personal service has not, however, been recognized in this country as involving a liability to criminal punishment, except in the cases of soldiers, sailors, and possibly some others, nor would public opinion tolerate a statute to that effect. But we are also of opinion that, even if the contract of a seaman could be considered within the letter of the Thirteenth Amendment, it is not, within its spirit, a case of involuntary servitude. The law is perfectly well settled that the first ten Amendments of the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. . . . The prohibition of slavery in the Thirteenth Amendment is well known to have been adopted with reference to a state of affairs which had existed in certain States of the Union since the foundation of the government, while the addition of the words 'involuntary servitude' was said in Butchers' Benev. Asso. v. Crescent City L. S. L. & S. P. Co ("Slaughter House Cases," 16 Wall. 36; 21 L. ed. 394), to have been intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical revival of which might have been the revival of the institution of slavery under a different and less offensive name. It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptions,— such as military and naval enlistments,— or to the right of parents and guardians as to their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, Where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview. From the earliest historical period the contract of the sailor has been treated as an exceptional one and involving to a certain extent, the surrender of his personal liberty during the life of the contract."

contract is void as in violation of the amendment; but that where such breach involves deliberate fraud, as for example, where prepayment for the services has been made and received, the law will be sustained, even though the effort may be, by intimidation, to compel the performance of the promised services.

Equity courts would also undoubtedly feel themselves justified in issuing orders restraining servants from quitting work at a time that will endanger human life or limb, or, indeed, will cause unnecessary or irremediable pecuniary loss to the employer. Thus, for example, the train hands of a railway company might be forbidden to leave their employment before bringing their train to its destination, or at least to some station where additional hands might be obtained to operate the train.[40]

[40] Freund, *Police Power*, §§ 333, 452. See especially Toledo, etc., R. Co. v. Penn. Co., 54 Fed. Rep. 730; Arthur v. Oakes, 63 Fed. Rep. 310.

CHAPTER XLVI.

DUE PROCESS OF LAW.

§ 460. Due Process of Law: Definition of.

By the Fifth Amendment the prohibition is laid upon the Federal Government that "no person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." By the Fourteenth Amendment a similar prohibition with reference to the deprivation of life, liberty or property is laid upon the States.[1]

In almost every chapter of this treatise it has been necessary to discuss the meaning of these prohibitions with reference to the exercise of specific powers by the federal or state governments. In the present chapter, therefore, the attempt will be made to determine simply the general intent and scope of the phrase "due process of law."[2]

The specific enumeration in the Fifth Amendment of other personal rights furnishes possible ground for arguing that such enumerated rights are not included within the general provision as to due process of law, but it is sufficiently established that this is not the case. In other words, the scope of due process of law is to be determined independently of the specific guarantee of other rights. Thus in Chicago, etc., R. Co. v. Chicago[3] due process of law was held to prevent the States from taking private property

[1] The meaning of the phrase "due process of law" as employed in the Fifth and in the Fourteenth Amendments, would seem to be the same. It is true that in French v. Barber Asphalt Co. (181 U. S. 324; 21 Sup. Ct. Rep. 625; 45 L. ed. 879), the court say that "it may be that questions may arise in which different constructions and applications of their provisions may be proper," but so far as the author is aware, such a contingency has not yet arisen, and it is difficult to see how one may arise.

[2] For a general treatise on this subject see McGehee, *Due Process of Law*, published in 1906.

[3] 166 U. S. 226; 17 Sup. Ct. Rep. 581; 41 L. ed. 979.

for a public use without just compensation, despite the fact that this is specifically forbidden in the Fifth Amendment.

No complete and rigid definition of due process of law has been given by the Supreme Court. Indeed, it is questionable whether it is possible to give one. "Few phrases in the law are so elusive of exact apprehension as this," the court declare in the recent case of Twining v. New Jersey,[4] and add: "This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise."

The court, however, go on to say: "There are certain general principles, well settled, however, which narrow the field of discussion, and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, that the words 'due process of law' are equivalent in meaning to the words 'law of the land,' contained in that chapter of *Magna Charta* which provides that 'no freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers, or by the law of the land.'"[5]

In Hagar v. Reclamation Dist.[6] it is said: "It is sufficient to say that by due process of law is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law, it must be adapted to the end to be attained, and whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justness of the judgment sought. The clause, therefore, means that there can be no proceeding against life, liberty, or property which may result in deprivation of either, without the observance of those general

[4] 211 U. S. 78; 29 Sup. Ct. Rep. 14; 53 L. ed. 97.

[5] Citing Muray v. Hoboken Land Co., 18 How. 272; 15 L. ed. 372; Davidson v. New Orleans, 96 U. S. 97; 24 L. ed. 616; Jones v. Robbins, 8 Gray, 329; Cooley, *Const. Lim.*, 7th ed., 500; McGehee, *Due Process of Law*, 16.

[6] 111 U. S. 701; 4 Sup. Ct. Rep. 663; 28 L. ed. 569.

rules established in our system of jurisprudence for the security of private rights."

"By the law of the land," says Webster in a much quoted paragraph, "is most clearly intended the general law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty and property and immunities under the protection of general rules which govern society. Everything which may pass under the form of an enactment is not law of the land."[7]

Due process of law requires the adjudicating court to have jurisdiction both of the parties and of the subject-matter. "To give such proceedings any validity, there must be a tribunal competent by its constitution, that is, by the law of its creation, to pass upon the subject-matter of the suit."[8]

In Giozza v. Tiernan[9] the court say: "Due process of law within the meaning of the Amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

In Missouri Pacific Ry. v. Humes[10] the court, with reference to the limitations laid by the due process clause of the Fourteenth Amendment upon the States, say: "If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law."

§ 461. Historical Inquiry not Conclusive.

In large measure, the specific contents of the phrase "due process of law" are to be ascertained by "an examination of those

[7] Dartmouth Coll. v. Woodward, 4 Wh. 518; 4 L. ed. 629.
[8] Pennoyer v. Neff, 95 U. S. 714; 24 L. ed. 565.
[9] 148 U. S. 657; 13 Sup. Ct. Rep. 721; 37 L. ed. 599.
[10] 115 U. S. 512; 6 Sup. Ct. Rep. 110; 29 L. ed. 463.

settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." [11]

But this historical method of determining the meaning of the phrase is not to be exclusively resorted to, or when restorted to, the court concluded thereby. That is to say, the fact that a given procedure is not to be found accepted in English and prior American practice is not to be held as conclusively determining it not to be due process of law. If the procedure under examination can be shown to preserve the fundamental characteristics and to provide the necessary protection to the individual, which the Constitution was intended to secure, its novelty will not vitiate it. Thus in Hurtado v. California,[12] in which substitution by the State of prosecution by information in lieu of indictment was recognized as valid, the court declare that a true philosophy of American personal liberty and individual right permits "a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give from time to time new expression and greater effect to modern ideas of self-government;" and that "this flexibility or capacity for growth and adaptation is the peculiar boast and excellence of the common law." "It follows," the argument concludes, "that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." And in Twining v. New Jersey[13] the court declare that to adopt the principle that a procedure established in English law at the time of the emigration and brought to this country and practised here by our ancestors is necessarily an element in due process of law would be to fasten

[11] Twining v. New Jersey, 211 U. S. 78; 29 Sup. Ct. Rep. 14; 53 L. ed. 97.
[12] 110 U. S. 516; 4 Sup. Ct. Rep. 111; 28 L. ed. 232.
[13] 211 U. S. 78; 29 Sup. Ct. Rep. 14; 53 L. ed. 97.

the procedure of the first half of the seventeenth century upon American jurisprudence like a straight jacket which could only be unloosened by constitutional amendment. It would be, as declared by Justice Matthews in Hurtado v. California, "to deny every quality of the law but its age, and to render it incapable of progress or improvement."[14]

§ 462. Rules of Evidence and Procedure May Be Changed.

Thus it has been held that, so long as the fundamental rights of litigants to a fair trial, as regards notice, opportunity to present evidence, etc., and adequate relief are provided, and specific requirements of the Constitution are not violated, Congress has a full discretion as to the form of the trial or adjudication, and the character of the remedy to be furnished. Thus, the States not being bound by the Fifth, Sixth and Seventh Amendments, grand and petit juries may be dispensed with by them.[15] So also, within limits, legislatures may determin what evidence shall be received, and the effect of that evidence, so long as the fundamental rights of the parties are preserved.[16]

No person has a vested right to a particular remedy. "The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the federal Constitution."[17] Statutes of limitations, if reasonable, are not unconstitutional as denial of property or contractural rights. The

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[14] See also Holden v. Hardy, 169 U. S. 366; 18 Sup. Ct. Rep. 383; 42 L. ed. 780.

[15] Hurtado v. California, 110 U. S. 516; 4 Sup. Ct. Rep. 111; 28 L. ed. 232; Maxwell v. Dow, 176 U. S. 581; 20 Sup. Ct. Rep. 448; 44 L. ed. 597.

[16] See Fong Yue Ting v. United States, 149 U. S. 698; 13 Sup. Ct. Rep. 1016; 37 L. ed. 905, and authorities there cited. In Adams v. New York (192 U. S. 585; 24 Sup. Ct. Rep. 372; 48 L. ed. 575), it was held that due process of law was not denied by a state law making possession of policy slips *prima facie* evidence of "possession thereof knowingly," and as such a crime.

[17] Brown v. New Jersey, 175 U. S. 172; 20 Sup. Ct. Rep. 77; 44 L. ed. 119.

authorities as to this are so uniform and numerous as not to need citation.

In Twining v. New Jersey[18] it is declared that due process of law does not include exemption of an accused from compulsory self-incrimination.

In Hammond Packing Co. v. Arkansas[19] it was held that due process of law is not denied by a state court striking from the files the answer of a foreign corporation and rendering a judgment by default against it, as permitted by state law when the defendant disobeys an order to secure the attendance as witnesses of certain of its officers and agents, and the production of papers and documents in their possession or control.

The case was distinguished from that of Hovey v. Elliott[20] in which it had been held a denial of due process for a court, as a punishment for contempt, based upon a refusal to obey an order of the court, to deny a right of the defendant to defend, and to give judgment without more ado to the plaintiff. The court in the Hammond case say: "Hovey v. Elliott involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession, and a resulting striking out of an answer and a default. The proceeding here taken may, therefore, find its sanction in the undoubted right of the lawmaking power to create a presumption of the fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in Hovey v. Elliott, and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. In

[18] 211 U. S. 78; 29 Sup. Ct. Rep. 14; 53 L. ed. 97.
[19] 212 U. S. 322; 29 Sup. Ct. Rep. 370; 53 L. ed. 530.
[20] 167 U. S. 409; 17 Sup. Ct. Rep. 841; 42 L. ed. 220.

[illegible] the presump- [illegible] the adminis- [illegible] the want of merit [illegible] the case and [illegible] the process, to preserve [illegible] In its ultimate [illegible] allow was like the [illegible] because of a [illegible] that the material [illegible] not answering, and [illegible] many other presump- [illegible] to a cause to [illegible] the mode pre- [illegible] the law of [illegible] the states, afford [illegible] default for [illegible] the production of which [illegible]

§ [illegible] Appeal not Essential to Due Process.

[illegible] of a right of [illegible] In McKane v. Durston[illegible] the court [illegible] of the final [illegible] offense of which [illegible] law, and is not now [illegible] of due process of law."[illegible] In Pittsburgh, etc., [illegible] with reference to a right of appeal in a matter [illegible] the court says: "If a single hearing is not due process, doubling it will not make it so."

[illegible] U. S. [illegible]; [illegible] Sup. Ct. Rep. [illegible]; [illegible] L. ed. [illegible].

[illegible] with approval in Reetz v. Michigan, [illegible] U. S. 505; 23 Sup. Ct. Rep. [illegible]; [illegible] L. ed. [illegible]; also in Andrews v. Swartz, [illegible] U. S. 272; [illegible] Sup. Ct. Rep. [illegible]; [illegible] L. ed. [illegible]; Fullbrook v. Bradley, 164 U. S. 112; [illegible] Sup. Ct. Rep. [illegible]; [illegible] L. ed. [illegible].

[illegible] U. S. [illegible]; [illegible] Sup. Ct. Rep. [illegible]; [illegible] L. ed. [illegible].

§ 464. Confronting Witnesses.

It is not essential to due process of law that in criminal causes the accused shall be confronted at the time of trial with the witnesses against him. This is specifically required by the Sixth Amendment in the federal courts, but in West v. Louisiana[24] it is held that the Fourteenth Amendment does not lay this obligation upon the States. In this case the court admitted a deposition of a witness not present at the trial, but which had been given at a preliminary examination at which the accused was present and had had an opportunity to cross-examine.[25]

§ 465. Trial in Courts of Law not Essential.

It is not essential to due process of law that proceedings and adjudications, though admittedly of a judicial nature, should be had in courts of law. It not infrequently happens that administrative boards or officers in the discharge of their duties are compelled to consider and decide upon matters of a judicial character, and, provided an adequate opportunity is offered to the parties to appear and defend, due process of law is not denied by making the administrative determinations they reach conclusive and not open to further consideration in the courts, except, of course, as to the matter of the jurisdiction of the officers or boards in question, or as to whether adequate notice and opportunity to

[24] 194 U. S. 258; 24 Sup. Ct. Rep. 650; 48 L. ed. 965.

[25] The court say: "We are of opinion that no federal right of the plaintiffs in error was violated by admitting this deposition in evidence. Its admission was but a slight extension of the rule of the common law, even as contended for by counsel. The extension is not of such a fundamental character as to deprive the accused of due process of law. It is neither so unreasonable nor improper as to substantially affect the rights of an accused party, or to fundamentally impair those general rights which are secured to him by the XIV Amendment. The accused has, as held by the state court in such case, been once confronted with the witness, and has had opportunity to cross-examine him, and it seems reasonable that when the State cannot procure the attendance of the witness at the trial, and he is a non-resident and is permanently beyond the jurisdiction of the State, that his deposition might be read equally as well as when his attendance could not be enforced because of death or of illness, or his evidence given by reason of insanity."

defend has been given the parties affected. In short, "due process is not necessarily judicial process."[26] This subject is more fully discussed in Chapter LXIV of this treatise.

§ 466. Unessential Statutory Formalities.

The mere failure to comply with certain formalities prescribed by a state law is not, without reference to what those formalities are, a denial of due process. "When, then, a state court decides that a particular formality was or was not essential under a state statute, such decision presents no federal question, providing always that the statute as thus construed does not violate the Constitution of the United States by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the state interpretation of its own law is controlling and decisive."[27]

§ 467. Fixed Interpretation of Laws not Guaranteed.

So also it has been held that due process of law does not protect the individual who, in obedience to an interpretation given by executive officers to a statute, takes action which is later held by the courts to be unwarranted by that statute. Thus, with reference to a state tax law the court in Thompson v. Kentucky[28] declare: "Due process of law does not assure to a taxpayer the interpretation of laws by the executive officers of a State as against their interpretation by the courts of a State, or relief from the consequences of a misinterpretation by either. . . . It is the province of the courts to interpret the laws of the State, and he who acts under them must take his chance of being in accord with the final decision. And this is a hazard under every law, and from which or the consequences of which we know of no security."

[26] Reetz v. Michigan, 188 U. S. 505; 23 Sup. Ct. Rep. 390; 47 L. ed. 563. See also Davidson v. New Orleans, 96 U. S. 97; 24 L. ed. 616; Murray's Lessee v. Hoboken Land Co., 18 How. 272; 18 L. ed. 372; Wilson v. North Carolina, 169 U. S. 586; 18 Sup. Ct. Rep. 435; 42 L. ed. 865.

[27] Castillo v. McConnico, 168 U. S. 674; 18 Sup. Ct. Rep. 229; 42 L. ed. 622. See also French v. Taylor, 199 U. S. 274; 26 Sup. Ct. Rep. 76; 50 L. ed. 189.

[28] 209 U. S. 340; 28 Sup. Ct. Rep. 533; 52 L. ed. 822.

§ 468. Due Process and Substantive Rights.

In the discussion thus far had as to the meaning of due process, only its procedural or adjective side has been emphasized. We turn now to examine in how far substantive rights are secured to the individual by the process clauses.[29]

§ 469. Per Legem Terrae.

It is quite plain that the phrase due process of law is historically related to and derived from the phrase "*per legem terrae*" of *Magna Charta,* and that the provisions of that fundamental document were intended, and have since been treated as a limitation not on the legislature but upon the executive and the courts. The provision *per legem terrae* thus means in the English law that the individaul shall not be deprived of his life, liberty or property by arbitrary acts, unsupported by existing law, whether common or statutory, by the King or his courts. But that the law is subject to change at the will of Parliament is not and has not been doubted.[30] The property rights of the individual were thus at the time of the adoption of our Constitution, and have since remained, subject to the plenary legislative power of Parliament.

There is thus some historical ground for holding that, in the absence of explicit provision to the contrary, the due process clauses of the federal Constitution were not intended as a restraint, the one upon Congress, and the other upon the state legislatures.

§ 470. Distinction between English and American Constitutional Doctrines.

Upon the other hand, however, the general purpose of written constitutions in the United States, if not originally in all cases, has come to be quite different from that of *Magna Charta.* In

[29] See *University of Penn. Law Review* (LVIII: 191), article "The Due Process Clauses and the Substance of Individual Rights," and *American Law Review* (XLIII: 926) for arguments that due process should have been restricted in its application to matters of procedure.

[30] The very few *dicta* to the contrary, as for example, that of Coke in Bonham's Case (8 Coke, 115) are without weight.

this country our written instruments of government and their accompanying Bills of Rights have for their aim the delimitation of the powers of all the departments of government, the legislative as well as the executive and judicial, and it is, therefore, quite proper to hold that the requirement of due process of law should not only prohibit executive and judicial officers from proceeding against the individual, except in conformity with the procedural requirements which have been mentioned in the earlier part of the chapter, but also operate to nullify legislative acts which provide for the taking of private property without compensation, or life or liberty without cause, or, in general, for executive or judicial action against the individual of an arbitrary or clearly unjust and oppressive character.

In 1869 in Hepburn v. Griswold[31] the Supreme Court took definitely the view that Congress was restrained by the due process clause of the Fifth Amendment.

With reference to the inhibitions of the Fourteenth Amendment there was never any doubt that they restrained the legislative power of the States. In *Ex parte* Virginia[32] it was held that these inhibitions might be violated by a state court which, though not directed so to do by a state statute, should in fact in its procedure or by its orders impair the rights sought to be protected; and the flat doctrine is laid down that all the departments of the state governments are restrained by the Fourteenth Amendment. The court say: "A State acts by its legislature, and its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, . . . shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position, under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition."

In Hurtado v. California,[33] decided in 1884, the argument that

[31] 8 Wall. 603; 19 L. ed. 513.

[32] 100 U. S. 339; 25 L. ed. 676.

[33] 110 U. S. 516; 4 Sup. Ct. Rep. 111; 28 L. ed. 232.

the provisions of our Bills of Rights restrain the legislature, is given in full, the distinction between English and American constitutional doctrines in this respect being emphasized.[34]

From what has gone before it is apparent that a court by the decision which it renders may deny due process of law to the individual either by applying (instead of declaring void) a law

[34] The court say: "The concessions of *Magna Charta* were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary Acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in Bonham's Case (8 Coke, 115, 118*a*) the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty, against legislative tyranny was the power of a free public opinion represented by the Commons. In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of *Magna Charta* were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial. . . . It is not every Act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'The general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, Acts of attainder, Bills of pains and penalties, Acts of confiscation, Acts reversing judgments and Acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude."

It is interesting to note that the tendency at first was to restrict the inhibitions of the Fourteenth Amendment to the legislatures of the States, thus reversing the English practice which restricted the provisions of *Magna Charta* and the Bill of Rights to the executive and the courts; and that it is only since *Ex parte* Virginia (100 U. S. 339; 25 L. ed. 676) that it has been clearly held that the courts and the executive agent of the States, may by arbitrary action upon their part deprive persons of life, liberty and property without due process of law or deny to them the equal protection of the law.

which deprives a suitor of a procedural or substantive right, or by so construing a law so as to give to it this effect. In either of these cases a constitutional right is involved upon which to base an appeal from the state courts to the federal Supreme Court.

§ 471. Doctrine Adopted that Due Process Includes Substantive Rights.

In C., B. & Q. R. R. Co. v. Chicago[35] the court say in language leaving no room for doubt: "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment."

When, however, the complaint is merely that a state court has erroneously decided the facts of a case, all of the proceedings before it being regular and sufficient, no claim of a denial of due process can be set up. In Central Land Co. v. Laidley[36] the court state this doctrine, saying: "When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States."[37]

§ 472. Erroneous Interpretation of the Law.

It is, however, possibly arguable, that, notwithstanding the doctrine just stated, a claim that due process of law has been denied may be set up when a court has refused to the defeated litigant the benefit of the existing law controlling the matter in

[35] 166 U. S. 226; 17 Sup. Ct. Rep. 581; 41 L. ed. 979.

[36] 159 U. S. 103; 16 Sup. Ct. Rep. 80; 40 L. ed. 91.

[37] Citing Walker v. Sauvinet, 92 U. S. 90; 23 L. ed. 678; Head v. Amoskeag Mfg. Co., 113 U. S. 9; 5 Sup. Ct. Rep. 441; 28 L. ed. 889; Morley v. Lake Shore, etc., R. Co., 146 U. S. 162; 13 Sup. Ct. Rep. 54; 36 L. ed. 925; Bergemann v. Backer, 157 U. S. 655; 15 Sup. Ct. Rep. 727; 39 L. ed. 845.

suit by giving a clearly erroneous interpretation either to a statute, or to the common law.

In support of this doctrine the argument is that the litigant has the right to the benefit of the existing law defining and providing for the protection of the rights involved; and that while it be true that, generally speaking, it is the peculiar province of the state courts to determine what that law is, yet, when they give an interpretation to a statute which is clearly unreasonable, or stronger still, when they reverse a prior and well-established interpretation, the federal Supreme Court may assume jurisdiction on error and hold that due process of law has been denied. In other words, it may be argued that just as a legislative act is void when, to sustain its constitutionality, is required a construction of the Constitution under which it is enacted which is beyond reason, so here, the federal court will reverse the decision of a state court based upon an interpretation of law which, in the opinion of the federal court, is beyond reason, or clearly in amendment of a previously established rule.

It is to be admitted that the Supreme Court has repeatedly repudiated the doctrine as above set forth; but upon the other hand, there are several cases in which the decision reached, and even the language employed has seemed to imply a recognition of it.[38]

In Scott v. McNeal,[39] a case coming to the Supreme Court by writ of error to review the judgment of the highest court of a State upon the ground that the judgment therein denied due process of law to the plaintiff in error, the federal court held that it was "no more bound by that [the state] court's construction of a statute of the Territory or of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a sub-

[38] Upon this point see the valuable article by Mr. Henry Schofield entitled "The Supreme Court of the United States and the Enforcement of State Law by State Courts," in the *Illinois Law Review*, III, 195 (Nov. 1908).

[39] 154 U. S. 34; 14 Sup. Ct. Rep. 1108; 38 L. ed. 896.

sequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case, this court must decide for itself the true construction of the statute."

In this case the state court had held, that, under a state statute, the appointment by a probate court of an administrator of the estate of a person, believed dead, but in fact alive, was valid as to him, although he had received no notice thereof. "No judgment," the federal Supreme Court say, "is due process of law, if rendered without jurisdiction in the court or without notice to the party."

As to the correctness of this last statement there can be no doubt, but it will be observed that the Supreme Court did not hold that, because the state law, as interpreted by the state court, permitted this to be done, it was to be held void. Rather, it held that it would not follow the decision of the state court which gave to the state law this effect. In short, the federal court, in effect, said that the state court had, by an erroneous decision of what the state law was, deprived the plaintiff in error of property without due process of law.

It is to be observed, however, that this error upon the part of the state court was one which permitted the state probate court to exercise jurisdiction over a party over whom it had not obtained jurisdiction, and that thus an essential requirement of due process upon its procedural side was disregarded. The case was not, therefore, one in which the federal court had held that a mere error upon the part of a state court, whether by way of a misconstruction of a statute, or the reversal of an earlier construction of a statute, or a novel determination of the common law, operated as a denial to the defeated party of his right to the benefit of the state law at the time his right of action or other property right accrued.

In Chicago, B. & Q. R. Co. v. Chicago,[40] however, a case coming to the Supreme Court by writ of error to the Supreme Court of

[40] 166 U. S. 226; 17 Sup. Ct. Rep. 581; 41 L. ed. 979.

the State of Illinois, this step seems to have been taken. In this case the constitutionality of a state law was not involved, the only question being whether by an award sustained in the state court of one dollar of damages to the plaintiff company as compensation for valuable property taken for a public use, it had been deprived of property without due process of law. The federal court held such to be the case, saying, in words earlier quoted: "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby its private property is taken for the State, or under its direction for public use, without compensation made or secured to the owner, is, under principle and authority, wanting in due process of law required by the Fourteenth Amendment."

The Supreme Court in its opinion admit that the original verdict might not unreasonably be taken as meaning that, in the opinion of the jury, the company's property proposed to be taken was not materially damaged, and that, as in so far as this estimate was one of fact, it was not subject to revision on writ of error. But it was pointed out that the jury had acted under instructions from the Supreme Court of the State, which instructions practically controlled its determination, and these judicial instructions the federal Supreme Court held to have been improper and to have resulted in the taking of property for a public use without due compensation paid or received, and that this was a deprivation of property without due process of law.

Here again, it is plain that, as in Scott v. McNeal, the federal court declined to follow the decision of a state court as to the law applicable to the matter in suit, upon the ground that to do so would permit the deprivation of property without due process of law. And, furthermore, this refusal was based on the principle that a litigant being entitled to the benefit of existing law governing his rights, a mere misinterpretation by a state court of what that law is, and which does not necessarily involve a denial of an essential procedural requirement of due process of law, is a denial of due process such as would support the revisionary power of the Supreme Court on writ of error.

In Muhlker v. New York & Harlem R. Co.[41] there had been a complete reversal of ruling by the state court as to the legal right of the plaintiff to recover damages due to the creation of an elevated railway structure on the street upon which his property abutted. Upon error, the Supreme Court of the United States refused to follow the later decision of the state court as to the requirements of the state law. By a very forced construction the Supreme Court was able to hold that a contract right to indemnity had been violated by a state law. The court admit, however, that the question of due process of law was involved, and it would seem that the decision might have been more satisfactorily disposed of upon this ground.

It being established, then, that substantive rights of individuals are protected by the due process of law clauses, it becomes necessary to consider what these rights of life, liberty, and property are.

§ 473. Life.

The right of life requires no definition.

§ 474. Liberty.

Liberty and property are terms which have each received definitions broad enough to cause their connotations in very considerable measure to overlap. Thus in Allgeyer v. Louisiana,[42] the court, defining liberty, say: "The liberty mentioned in the Fourteenth Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the engagement of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

With this definition of liberty, may be compared the following

[41] 197 U. S. 544; 25 Sup. Ct. Rep. 522; 49 L. ed. 872.

[42] 165 U. S. 578; 17 Sup. Ct. Rep. 427; 41 L. ed. 832.

definition, by the Supreme Court of Illinois, of property: "The right of property preserved by the Constitution," say the court, "is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage. And as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty." [43]

The foregoing definitions make it sufficiently plain that contractual rights, as a species of property rights, or as included within the definition of liberty, are fully protected by the due process clauses. In Holden v. Hardy[44] there is an explicit statement to this effect.[45]

The manner in which the rights of property and of liberty, including liberty of contract, are held subject to the exercise of such powers of the State as those of eminent domain, taxation, the regulation of occupations affected with a public interest, and, especially, the police power, is considered *passim* throughout this treatise, and does not require specific treatment in this place.

§ 475. Equal Protection of the Law.

The United States is not by the Constitution expressly forbidden to deny to anyone the equal protection of the laws, as are

[43] Braceville Coal Co. v. People, 147 Ill. 66. Quoted by McGehee, *Due Process of Law*, p. 141.

[44] 169 U. S. 366; 18 Sup. Ct. Rep. 383; 42 L. ed. 780.

[45] In that case the court say: As the possession of property, of which a person can not be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision. Indeed, we may go a step further, and say that as property can only be legally acquired, as between living persons, by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid.

the States by the first section of the Fourteenth Amendment. It would seem, however, that the broad interpretation which the prohibition as to "due process of law" has received is sufficient to cover very many of the acts which, if committed by the States, might be attacked as denying equal protection. Thus it has been repeatedly declared that enactments of a legislature directed against particular individuals or corporations, or classes of such, without any reasonable ground for selecting them out of the general mass of individuals or corporations, amounts to a denial of due process of law so far as their life, liberty or property is affected. One of the requirements of due process of law, as stated by the Supreme Court, is that the laws "operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." [46]

In Smyth v. Ames[47] the authorities are reviewed, and from them the general conclusion drawn that a state law "establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws."

Throughout this case, indeed, the requirement of due process is treated as necessarily including equal protection within its scope.

The further definition of equal protection is reserved for consideration in the chapters dealing with the constitutional limitations laid upon the States.

§ 476 The Federal Government and the Obligation of Contracts.

No specific inhibition is laid upon the Federal Government by the Constitution with reference to the impairment of the obligation of contracts. That government is, however, forbidden by the

[46] For other similar declarations, see those quoted by McGehee, *Due Process of Law*, p. 61.

[47] 169 U. S. 466; 18 Sup. Ct. Rep. 418; 42 L. ed. 819.

Fifth Amendment to deprive persons of property without due process of law or to take private property for a public use without just compensation. In so far, then, as contract rights may be treated as property they are protected from direct impairment by federal action. This was definitely declared, as we have earlier seen in the first legal tender decision of Hepburn v. Griswold.[48]

Contracts are not, however, protected from an indirect impairment of their obligation when this incidentally results from the exercise by Congress of a legislative power constitutionally given to it. Thus in Knox v. Lee[49] in which, reversing the opinion in Hepburn v. Griswold, it was held that, under its power to carry on war and to maintain its own existence, the Federal Government might authorize the issuance of legal tender notes valid in payment of debts previously contracted,[50] the court deny that the obligation of contracts is thereby impaired; but they go on to say, even if it be held that the obligation of contracts is thereby impaired, this is no constitutional objection.

"Nor can it be truly asserted," the opinion declares, "that Congress may not, by its action, indirectly impair the obligation of contracts if by the expression be meant rendering contracts fruitless, or partially fruitless. Directly it may, confessedly by passing a Bankrupt Act, embracing past as well as future transactions. . . . So it may relieve parties from their apparent obligations indirectly in a multitude of ways. It may declare war, or even in peace pass non-intercourse acts, or direct an embargo."

With reference to the due process of law requirement of the Fifth Amendment, the court say: "That provision has always been understood as referring only to a direct appropriation and not to consequential injuries resulting from the exercise of lawful power. It has not been supposed to have any bearing upon or

[48] 8 Wall. 603; 19 L. ed. 513.

[49] 12 Wall. 457; 20 L. ed. 287.

[50] In a still later case, Juilliard v. Greenman (110 U. S. 421; 4 Sup. Ct. Rep. 122; 28 L. ed. 204) it was held that the power to issue legal tender notes is implied in the power to borrow money, as well as from other express power, and, therefore, may be exercised in times of peace as well as of war.

to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft or a war, may inevitably bring upon individuals great losses, may indeed render valuable property almost valueless. They may destroy the worth of contracts." But such laws, of course, are not, therefore, void.

In the Sinking Fund Cases,[51] it is declared : "The United States cannot any more than a State interfere with private rights except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law."

[51] 99 U. S. 700; 25 L. ed. 496.

CHAPTER XLVII.

PROHIBITIONS LAID UPON THE STATES.

§ 477. Prohibitions Upon the States.

The prohibitions upon state action imposed by the federal Constitution are of two kinds: (1) those which arise from the fact that their exercise would be inconsistent with the powers possessed by the Federal Government; and (2) those specifically laid down in the federal Constitution. Those limitations upon the powers of the States incidental to the general nature of the Federal Government and to the powers possessed by it are treated in their appropriate places in this treatise. In this chapter there will be considered the express limitations upon the States as enumerated in the Constitution. These are found in Section X of Article I, and the Thirteenth, Fourteenth, and Fifteenth Amendments.[1]

Various other clauses of the Constitution, as for example Sections I, II and IV of Article IV and Article VI, by imposing specific obligations upon the States may be said to create corresponding limitations, but these are elsewhere considered in this work.

That the prohibitions of the first eight amendments, like those contained in Section IX of Article I of the Constitution relate exclusively to the Federal Government, and place no restrictions upon state action has been uniformly held since the first declaration of the principle in Barron v. Baltimore.[2] That the adoption of the Fourteenth did not operate to alter this doctrine has been

[1] Certain of these limitations are, for topical reasons, considered elsewhere.

[2] 7 Pet. 243; 8 L. ed. 672. In Twitchell v. Penn. (7 Wall. 321; 19 L. ed. 223) the court say: "The scope and application of these amendments are no longer subject to discussion here." This statement is quoted in United States v. Cruikshank (92 U. S. 542; 23 L. ed. 588), the court adding: "They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States."

pointed out in this treatise.[3] The specific prohibitions laid upon the States with reference to slavery and involuntary servitude, due process of law, and the legal protection of the laws, have been considered in the preceding chapter.

§ 478. Bills of Credit

The first clause of Section X of Article I of the Constitution declares that "no State shall . . . emit bills of credit; [or] make anything but gold and silver coin a tender in payment of debts."

In Craig v. Missouri,[4] decided in 1830, the Supreme Court was for the first time called upon to determine squarely what constitutes a "bill of credit" within the meaning of the constitutional prohibition. In this case was questioned the power of the State to issue certain interest bearing certificates, not declared legal tender, but receivable at the treasury of any of the loan offices of the State in discharge of taxes or payment of debts due to the State. Certain property of the State was pledged to their redemption, and the governor was authorized to negotiate a loan of silver or gold for the same purpose. These certificates, it was provided, might be loaned to citizens of the States upon real estate or personal security. These certificates, the Supreme Court held, Justices Thompson, M'Lean and Johnson dissenting, to be bills of credit, and as such illegally emitted. In his opinion Marshall says: "In its enlarged, and perhaps its literal sense, the term 'bill of credit' may comprehend any instrument by which a State engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word 'emit' is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in

[3] Chapter XI.
[4] 4 Pet. 410; 7 L. ed. 903.

common language, denominated 'bills of credit.' To 'emit bills of credit' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day."

Having adverted to the characteristics of the certificates in question, their denominations — from ten dollars to fifty cents — their receivability for taxes, etc., as indicating conclusively that they were fitted and intended for circulation as currency, the court next overrules the contention that they were not to be deemed bills of credit in the constitutional sense because not made legal tender. "The Constitution itself," it is declared, "furnishes no countenance to this distinction. The prohibition is general. It extends to all bills of credit, not to bills of a particular description."

In the case of Briscoe v. Bank of Kentucky[5] was questioned the power of a State to charter a bank, of which the State was the sole stockholder, with the power of issuing notes payable to bearer on demand designed to circulate as money. The case was first argued just before the death of Chief Justice Marshall, and the issue of these notes by the bank was held to be, in effect, the issuance of bills of credit by the State itself. A rehearing being granted, however, and the case coming on for argument before the court presided over by Taney, the previous decision was reversed, and the notes held to be constitutionally issued. Justice M'Lean delivered the opinion of the court, saying: "To constitute a bill of credit within the Constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State, and is so received and used in the ordinary business of life. The individuals or committee who issue the bill must have the power to bind the State; they must act as agents, and of course do not incur any personal responsibility, nor impart, as individuals, any credit to the paper. These are the leading characteristics of a bill of credit, which a State cannot emit."

[5] 11 Pet. 257; 9 L. ed. 709.

Continuing, the court deny that the notes of the bank were issued by the State, or that they contained a pledge of the credit of the State. The fact that the State was the exclusive stockholder of the bank is held immaterial. Quoting from Bank of United States v. Planters' Bank[6] the principle is declared that "the United States does not, by becoming a corporation, identify itself with the corporation." Upon the contrary, by becoming a partner in or the owner of stock of a trading company "it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates itself." [7]

In Darrington v. Bank of Alabama[8] the doctrine of the Briscoe case was reaffirmed. In this case the State was not only the sole stockholder of the bank but had pledged its faith for the ultimate redemption of its notes. This, however, it was held, did not operate to transform the notes into state-emitted bills of credit for the reason that the bank had corporate property of its own which was primarily liable and sufficient for the payment of the notes. It was admitted that some reliance might have been placed upon the State's guaranty, but this liability, the court declared, was 'altogether different from that of a State on a bill of credit. It was remote and contingent, and it could have been nothing more than a formal responsibility if the bank had been properly conducted. No one received a bill of this bank with the expectation of its being paid by the State."

In the Virginia coupon case of Poindexter v. Greenhow[9] the court held that interest coupons cut from bonds issued by the State and made receivable by the State in payment of taxes due it, were not bills of credit. Though promises to pay money, and

[6] 9 Wh. 904; 6 L. ed. 244.

[7] A strong dissenting opinion was filed by Justice Story.

[8] 13 How. 12; 14 L. ed. 30.

[9] 114 U. S. 270; 5 Sup. Ct. Rep. 903; 29 L. ed. 185.

the credit of the State pledged therefor, and receivable by the State for taxes, the coupons were not issued or emitted as a circulating medium or paper currency.

In Houston, etc., Ry. Co. v. Texas[10] a warrant drawn by state authorities in payment of an appropriation made by the legislature for a debt due by the State and payable upon presentation if there should be funds in the treasury, was held not to be a bill of credit within the meaning of the constitutional prohibition.

§ 479. Ex Post Facto Legislation.

By Section X, Clause I of Article I, the States are forbidden to pass any *ex post facto* law. The same prohibition is laid upon the federal legislature by the third clause of Section IX, and the force of this prohibition has been sufficiently considered in the preceding chapter.

§ 480. Equal Protection of the Law.

As in the case of due process of law, the requirement of the Fourteenth Amendment as to equal protection of the law receives specific incidental consideration, throughout this treatise. It is, therefore, not necessary here to do more than state the general meaning of the term.

Shortly stated, the requirement is not that all persons (including corporations) shall be treated exactly alike, but that where a distinction is made there shall be a reasonable ground therefor — one based on administrative or political necessity or convenience, or on economic needs. Thus in the exercise of the States' powers of taxation or of police, or of other powers, classifications of the persons or properties to be affected may be made. But, when such classifications are made, the laws must operate uniformly upon all the members of each class. This subject is elsewhere particularly discussed in connection with the law of inheritance taxes and special assessments.[11]

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[10] 177 U. S. 66; 20 Sup. Ct. Rep. 545; 44 L. ed. 673.

[11] See §§ 520–527.

§ 481. Corporations Protected.

Corporations equally with natural persons are entitled to the protection of the clause. "The inhibition of the amendment . . . was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution." [12]

But is is to be observed that as to foreign corporations, a State having the constitutional right to say whether a corporation not chartered by itself shall do business within its limits (interstate commerce excepted) the State may impose upon such corporations as conditions precedent to the enjoyment of the privilege, such special conditions as it may see fit.[13]

Perhaps the best general statement of the scope and intent of the provision for the equal protection of the laws is that given by Justice Field in his opinion in Barbier v. Connolly,[14] in which, speaking for the court, he says:

"The Fourteenth Amendment in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the pre-

[12] Pembina Silver Mining Co. v. Pennsylvania, 125 U. S. 181; 8 Sup. Ct. Rep. 737; 31 L. ed. 650.

[13] But see the discussion as to the right of the State to prevent foreign corporations from exercising the federal right of removing suits brought against them into the federal courts (Section 571). See also, generally, the chapters dealing with the control of the States over Interstate Commerce.

[14] 113 U. S. 27; 5 Sup. Ct. Rep. 357; 28 L. ed. 923.

vention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment. In the execution of admitted powers unnecessary proceedings are often required, which are cumbersome, dilatory and expensive, yet, if no discrimination against anyone be made and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The incon-

veniences arising in the administration of the laws from this cause are matters entirely for the consideration of the State; they can be remedied only by the State. In the case before us, the provisions requiring certificates from the health officer and the board of fire wardens may, in some instances, be unnecessary, and the changes to be made to meet the conditions prescribed may be burdensome, but as we have said, this is a matter for the determination of the municipality in the execution of its police powers, and not a violation of any substantial right of the individual."

§ 482. Illustrative Cases Arising under the Equal Protection Cause.

The enumeration of some of the specific applications which the requirement of equal protection of the laws has received will sufficiently illustrate its scope and intent.

The provision of the Fourteenth Amendment guarantees to individuals and to corporations that they shall not by state law be excluded from the enjoyment of privileges which other persons and corporations similarly circumstanced enjoy, or that they may not have imposed upon them burdens which others similarly circumstanced are free from. But no one is guaranteed that in fact, through the fortuitous operation of a law, which in itself is not discriminative, a special burden may not be imposed, or the enjoyment of a privilege taken away. Thus, for example, in Strauder v. West Virginia[15] a state law was held invalid which denied to members of the colored race the right to act upon juries, the court saying, "the law in the State shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the State." But in Virginia v. Rives[16] and other cases[17] it is held that the fact that it happens that no negroes are in fact drawn upon the jury, or *vice versa,* that

[15] 100 U. S. 303; 25 L. ed. 664.

[16] 100 U. S. 313; 25 L. ed. 667.

[17] Neal v. Delaware, 103 U. S. 370; 26 L. ed. 567; Bush v. Kentucky, 107 U. S. 110; 1 Sup. Ct. Rep. 625; 27 L. ed. 354; Williams v. Mississippi, 170 U. S. 213; 18 Sup. Ct. Rep. 583; 42 L. ed. 1012.

no whites are so drawn is not constitutionally objectionable, unless it affirmatively appear that the state officials intrusted with the administration of the law arbitrarily and with intent have given an unequal and discriminative effect to the law.[18]

§ 483. Yick Wo v. Hopkins.

The case of Yick Wo v. Hopkins[19] involved the validity of an ordinance of the City of San Francisco which required all persons desiring to establish laundries in frame houses to obtain the consent of certain municipal officials. Here the law or ordinance was not upon its face discriminatory, but it was held void for the reason that it gave to the designated officials "not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent not only as to places but as to persons," and because the evidence showed in fact "an administration directed so exclusively against a particular class of persons [the Chinese] as to warrant and require the conclusion that whatever may have been the intent of the ordinances so adopted, they are applied by the public authorities charged with their administration and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the law which is secured to the petitioners as to all other persons by the broad and benign provisions of the Fourteenth Amendment." The court then go on to declare the general doctrine: "Though the law be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."[20]

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[18] See Gibson v. Mississippi, 162 U. S. 565; 16 Sup. Ct. Rep. 904; 40 L. ed. 1075.

[19] 118 U. S. 356; 6 Sup. Ct. Rep. 1064; 30 L. ed. 220.

[20] This principle of interpretation is declared to have been sanctioned in Henderson v. Mayor, 92 U. S. 259; 23 L. ed. 543; Chy Lung v. Freeman, 92 U. S. 275; 23 L. ed. 550; *Ex parte* Virginia, 100 U. S. 339; 25 L. ed. 676;

§ 483. Equal Protection of the Law does not Control the Grant of Political Rights.

The requirement as to equal protection of the law does not operate to prevent the States from restricting the enjoyment of political privileges to such classes of their citizens as they may see fit.[21]

§ 484. Classifications.

When there are reasonable economic or political or social reasons for doing so, certain ocupations or industries, or even classes of persons may be selected out for special regulation or for the enjoyment of special privileges.

Thus, for example, the practice of certain professions may be limited to persons of the male sex, or to those of a certain age, or to those possessing other qualifications that may reasonably be held to indicate a fitness for the profession.[22]

Thus also, as proper police measures, the States are permitted to impose special restrictions and liabilities upon railway corporations. Special modifications of the common-law doctrine of employer's liability with reference to them have been upheld, as have laws placing the presumption of negligence upon them when cattle have been killed by their trains, and laws making them responsible for fires kindled by sparks from their locomotives, though they may have taken every possible precaution to avoid such fires.[23]

However, in Gulf, etc., Ry. Co. v. Ellis[24] a state law was held void which imposed an attorney's fee in addition to costs upon

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Neal v. Delaware, 103 U. S. 370; 26 L. ed. 567; and Soon Hing v. Crowley, 113 U. S. 703; 5 Sup. Ct. Rep. 730; 28 L. ed. 1145. See also Grunding v. Chicago, 177 U. S. 183; 20 Sup. Ct. Rep. 633; 44 L. ed. 725. But see as to doctrine declared in Wilson v. Eureka City, 173 U. S. 32; 19 Sup. Ct. Rep. 317; 43 L. ed. 603.

[21] Chapter XXXVIII.

[22] *Re* Lockwood, 154 U. S. 116; 14 Sup. Ct. Rep. 1082; 38 L. ed. 929; Bradwell v. Illinois, 16 Wall. 130; 21 L. ed. 442.

[23] See especially St. Louis, etc., Co. v. Mathews, 165 U. S. 1; 17 Sup. Ct. Rep. 243; 41 L. ed. 611; Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205; 8 Sup. Ct. Rep. 1161; 32 L. ed. 107.

[24] 165 U. S. 150; 17 Sup. Ct. Rep. 255; 41 L. ed. 666.

railway companies which should fail to pay certain claims within a certain time after presentation. Here the court held that there was no reasonable relation between the burden imposed and the peculiar character of the business done.[25]

§ 485. Classifications Must Be Reasonable.

From what has gone before, it is clear that while classification of persons and businesses for purposes of regulation is not prohibited by the requirement of equal protection of the law, these classifications must in every case be reasonable ones. In Gulf, etc., Ry. Co. v. Ellis,[26] already cited, it is declared: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one

[25] The opinion declares: "A mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while, in certain cases, there may be a peculiar obligation which may be enforced with penalties, yet nothing of that kind springs from the mere work of railroad transportation. Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or mechanic alone, for its benefits are conferred upon every individual in the State, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency. Neither can it be sustained as a proper means of enforcing the payment of small debts, and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors, and punishes it for a failure to perform certain duties,—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon other guilty of like delinquency, this statute cannot be sustained."

[26] 165 U. S. 150; 17 Sup. Ct. Rep. 255; 41 L. ed. 666.

based upon some reasonable ground,— some difference which bears a just and proper relation to the attempted classification,— and is not a mere arbitrary selection."

Thus in Connolly v. Union Sewer Pipe Co.[27] a discrimination made by a state anti-trust law exempting from its operations agricultural products or live stock in the hands of the producer or raiser, was held a denial of the equal protection of the laws. In its opinion the earlier decisions in point are carefully reviewed and distinguished. With reference to the specific law in question the court say: "To declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill, as acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary." [28]

§ 486. State Laws and Judicial Systems Not Required to Be Uniform Throughout the State.

In Missouri v. Lewis[29] the important principle was laid down that the equal protection clause of the Fourteenth Amendment does not prevent the application by a State of different laws and different systems of judicature to its various local subdivisions.

[27] 184 U. S. 540; 22 Sup. Ct. Rep. 431; 46 L. ed. 679.

[28] Generally upon the subject of classifications, see Barbier v. Connolly, 113 U. S. 27; 5 Sup. Ct. Rep. 357; 28 L. ed. 923; Home Ins. Co. v. New York, 134 U. S. 594; 10 Sup. Ct. Rep. 593; 33 L. ed. 1025; Magoun v. Illinois T. & S. Savings Bank, 170 U. S. 283; 18 Sup. Ct. Rep. 594; 42 L. ed. 1037; Orient v. Daggs, 172 U. S. 557; 19 Sup. Ct. Rep. 281; 43 L. ed. 552; Tinsley v. Anderson, 171 U. S. 101; 18 Sup. Ct. Rep. 805; 43 L. ed. 91.

As to classifications of property for purposes of taxation see Bell's Gap, etc., Ry. Co. v. Pennsylvania, 134 U. S. 232; 10 Sup. Ct. Rep. 533; 33 L. ed. 892; Plumber v. Coler, 178 U. S. 115; 20 Sup. Ct. Rep. 829; 44 L. ed. 998.

[29] 101 U. S. 22; 25 L. ed. 989.

In this case was questioned the constitutionality of a law providing a special court of appeals with conclusive jurisdiction for the City of St. Louis and a few specified counties. To the claim that this law denied to the people of these districts the equal protection of the laws in that they were denied access to the general court of appeals of the State the Supreme Court replied: "There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. . . . The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. . . . Diversities which are allowable in different States are allowable in different parts of the same State."

§ 487. Equal Protection Requires Similar but not the Same Privileges.

Where similar or substantially similar conveniences and comforts are offered, transportation companies, inns, theaters, and other public service companies may by law be permitted or required to provide separate accommodations to the different races, colored, Mongolian, or white.[30]

In Plessy v. Ferguson[31] the court say: "The object of the Amendment was undoubtedly to enforce the absolute equality of the two races before the law; and in the nature of things it could not have been intended to abolish distinction based on color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, or even requiring, their separation in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency

[30] Plessy v. Ferguson, 163 U. S. 537; 16 Sup. Ct. Rep. 1138; 41 L. ed. 256; C. & O. Ry. Co. v. Kentucky, 179 U. S. 388; 21 Sup. Ct. Rep. 101; 45 L. ed. 244. The States may not, however, thus attempt the regulation of interstate transportation. See *ante*, section 312.

[31] 163 U. S. 537; 16 Sup. Ct. Rep. 1138; 41 L. ed. 256.

of state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power, even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."

CHAPTER XLVIII.

THE OBLIGATION OF CONTRACTS.

§ 488. The Obligation of Contracts Clause.

In addition to being prohibited by the Fourteenth Amendment from depriving any person of life, liberty, or property, without due process of law, the States are, by Section X, Article I of the Constitution, expressly denied the power to pass any law impairing the obligation of contracts. This provision, the general intent of which is sufficiently plain, has, in its application given rise to a multitude of cases requiring adjudication in the courts. The purposes of this treatise will not require us, however, to examine these cases in detail. Elsewhere in this treatise, certain specific applications of the prohibition are considered.[1] In this chapter the aim will be, as it was the aim in the chapter dealing with due process of law, to ascertain the broad and underlying principles which have governed the federal courts in the enforcement of the prohibition.

As has been already seen, the due process of law clause of the Fourteenth Amendment protects the individual in his right to enter into contracts not contrary to public policy. The provision under consideration protects from impairment the obligation of the contract when entered into.

So far as this provision is concerned, a state law divesting vested rights is not invalid, unless these rights are founded upon contracts, and the effect of the law is thus to impair or nullify their force.[2]

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[1] See especially the discussion of suits against the States, and the enforcement of state law by the federal courts.

[2] Satterlee v. Matthewson, 2 Pet. 380; 7 L. ed. 458; B. & S. R. R. v. Nesbit, 10 How. 395; 13 L. ed. 469; Bronson v. Kinzie et al., 1 How. 311; 11 L. ed. 143.

§ 489. Changes in Means or Manner of Enforcement of Contracts.

The obligation of a contract is not impaired by a law which changes the legal or equitable means for its enforcement, existing at the time it was entered into, provided an adequate even though not so convenient a remedy is retained or substituted therefor. The principle in this respect is thus similar to that discussed in connection with the due process of law clause.[3]

§ 490. Contracts May Be Validated by Curing Technical Defects.

Laws which operate to remedy or cure technical defects so as to give validity to otherwise invalid contracts are constitutional, their effect being to confirm rather than to impair the obligation of contracts.[4]

§ 491. Contracts by the State not to Tax.

Elsewhere in this treatise it is pointed out that, to a certain extent, the State's right of taxation may, in return for a substantial consideration, be parted with.[5] When thus parted with, the undertaking not to exercise the right in the manner specified constitutes a contract, the obligation of which is impaired by a

[3] Section 462. In Bronson v. Kinzie et al. (1 How. 311; 11 L. ed. 143), the court say: "If the laws of the State passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For undoubtedly, a State may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. . . . Although a new remedy be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract." Citing Green v. Biddle, 8 Wh. 1; 5 L. ed. 547.

[4] Watson v. Mercer, 8 Pet. 88; 8 L. ed. 876.

[5] Section 503.

subsequent law authorizing its exercise. The clause thus operates as a limitation upon the taxing power of the State. As to the police powers of the State, as will be presently shown, the rule is otherwise. No State, it has been held, may validly contract not to exercise in the future a contract which is necessary to the health, safety, comfort, or morality of its citizens.

§ 492. Contracts to Which a State is a Party.

The contracts, the obligation of which is secured from impairment by the States, include agreements between the States and between a State and an individual or individuals, as well as those between individuals. In other words, the State when contracting does so upon the same terms as a private individual or corporation, and may not plead its sovereignty as justifying subsequent action upon its part impairing the contractual obligations which it has assumed. Its non-amenability to suit may, however, enable a State to avoid the performance of an agreement which it has undertaken to perform. This branch of the subject is more fully discussed in the chapter of this treatise dealing with the Suability of the State.[6]

§ 493. What Constitutes a Contract.

Election or appointment to a public office does not create a contract between the State and the one so appointed.[7]

Marriage, though in some respects properly describable as a contract, is not one the obligation of which is protected from impairment by the State.

In the Dartmouth College case[8] Chief Justice Marshall declares: "The provision of the Constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the

[6] Chapter LIV.

[7] See Section 82, and especially the case of Butler v. Pennsylvania, 10 How. 402; 13 L. ed. 472.

[8] 4 Wh. 518; 4 L. ed. 629.

right of the legislature to legislate on the subject of divorce." In Maynard v. Hill[9] this doctrine is judicially affirmed, the court saying, marriage "is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities."

A license granted by a State, or by one of its political subdivisions, is not a contract within the meaning of the prohibition. It is nothing more than the grant of a privilege which so far as the federal prohibition regarding the impairment of the obligation of contracts is concerned may be revoked at any time at the will of the grantor, or additional conditions upon its enjoyment imposed. This principle is so well settled that a citation of authorities is scarcely needed. The only difficulty lies in determining in specific cases whether the grant of authority by the State is in the nature of a license or of a franchise, which is to be construed as a contract. However, the presumption is always against the existence of a contract. "A contract binding the State is only created by clear language and not to be extended by implication beyond the terms of the statute."[10]

§ 494. Foreign Corporations: Permission to do Business Within the State.

Generally speaking, the right of a foreign corporation to do business within a State is in the nature of a license which that State may revoke or modify at discretion. Where, however, the foreign corporation, relying upon an existing law to the effect that certain charges will not, for a certain period at least, be imposed upon it, has entered the State for the transaction of business there, a con-

[9] 125 U. S. 190; 8 Sup. Ct. Rep. 723; 31 L. ed. 654.

[10] Williams v. Wingo, 177 U. S. 601; 20 Sup. Ct. Rep. 793; 44 L. ed. 905; Fanning v. Gregoire, 16 How. 524; 14 L. ed. 1043.

tract to that effect is held to exist between it and the State, the obligation of which the latter may not impair. Thus in American Smelting, etc., Co. v. Colorado[11] it was held that "a contract right to do business in the State during the corporate lifetime of domestic corporations without being subject to any greater liabilities than were or might be imposed upon domestic corporations was acquired by a foreign corporation by virtue of its admission into the State of Colorado with the right to do business therein under the then-existing laws of that State, which, *inter alia,* subjected foreign corporations coming into the State to the liabilities restrictions, and duties which then were or might thereafter be imposed upon domestic corporations of like character, and that such right was unconstitutionally impaired by an act of the State, exacting from such corporation an annual tax or license fee in double the amount of that imposed upon domestic corporations."

§ 495. Charters of Public Corporations.

The charters of public corporations, investing them with subordinate legislative and other governmental powers are not contracts within the meaning of the obligation clause, and, so far as the federal Constitution is concerned, the state legislature has, with reference to them, unlimited powers of amendment or repeal. "It is settled law that the legislature in granting it [a municipal charter] does not divest itself of any power over the inhabitants of the district which it possessed before the charter was granted. Unless the Constitution otherwise provides, the legislature still has authority to amend the charter of such a corporation, enlarge or diminish its powers, extend or limit its boundaries, divide the same into two or more, consolidate two or more into one, overrule its action whenever it is deemed unwise, impolitic or unjust, and even abolish the municipality altogether, in the legislative discretion."[12]

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[11] 204 U. S. 103; 27 Sup. Ct. Rep. 198; 51 L. ed. 393.

[12] Laramie Co. v. Albany Co., 92 U. S. 307; 23 L. ed. 552. See also New Orleans v. New Orleans Waterworks Co., 142 U. S. 79; 12 Sup. Ct. Rep. 142; 35 L. ed. 943.

§ 496. Contracts by Municipal Corporations.

Where, however, municipalities or other subordinate political corporations have, in the exercise of their charter powers, entered into contracts, those contracts are protected from subsequent impairment by state law.[13] Such corporations, as holders of state securities and other contract obligations, are secured against their impairment.[14]

Generally speaking, also, franchises granted by municipal corporations, if authorized by their charters, are contracts which, under the authority of the Dartmouth College case, presently to be considered, are protected against impairment.

So also, a state law limiting the powers of taxation of a municipal corporation, whereby its ability to pay its debts is materially lessened, is void as to debts created prior thereto, the creditors relying upon the taxing powers of the corporation to provide the funds for the payment of their claims.[15]

In Louisiana v. New Orleans[16] the court declare it to be settled law that "where a municipal corporation is authorized to contract, and to exercise the power of local taxation to meet its contractual engagements, this power must continue until the contracts are satisfied; and that it is an impairment of an obligation of the contract to destroy or lessen the means by which it can be enforced."

So also, generally, it is held to be an impairment of the obligation of contracts entered into by municipal corporations to deprive them by subsequent state legislation of any authority whatsoever, whereby they may be rendered less able to perform their agreements, or whereby the enforcement of their claims by creditors is rendered more difficult or less certain. "That obligation is

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[13] New Orleans v. New Orleans Waterworks Co., 142 U. S. 79; 12 Sup. Ct. Rep. 142; 35 L. ed. 943.

[14] Mobile v. Watson, 116 U. S. 289; 6 Sup. Ct. Rep. 398; 29 L. ed. 620; Louisiana v. Pillsbury, 105 U. S. 278; 26 L. ed. 1090.

[15] United States v. Port of Mobile, 12 Fed. 768; Seibert v. Lewis, 122 U. S. 284; 7 Sup. Ct. Rep. 1190; 30 L. ed. 1161; Sawyer v. Concordia, 12 Fed. 754; Wolff v. New Orleans, 103 U. S. 358; 26 L. ed. 395; Ralls Co. v. United States, 105 U. S. 733; 26 L. ed. 1220.

[16] 30 Sup. Ct. Rep. 40.

impaired, in the sense of the Constitution, when the means by which a contract, at the time of its execution, could be enforced, that is, by which the parties could be obliged to perform it, are rendered less efficacious by legislation operating directly upon those means." [17]

"A by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States." [18]

§ 497. Charters of Private Corporations Are Contracts: The Dartmouth College Case.

In 1819 in the Dartmouth College case[19] a charter of a private corporation was held to be contract between the State granting it and the corporation, which the former might not impair by subsequent legislation. Prior to this decision, it had been held in Fletcher v. Peck,[20] decided in 1810, that the obligation clause applied to executed as well as to executory contracts, and to contracts entered into by the States as well as to those between private individuals. In New Jersey v. Wilson[21] it had also been held that a State might contract away its right of taxation as to certain specified persons and things, which contract could not be rescinded by a subsequent legislative act, and in Terrett v. Taylor[22] that the constitutional prohibition was applicable to contracts entered into by the States. In this last case a State was not permitted to divest title to certain lands, the title to which rested upon an earlier legislative grant.

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[17] Wolff v. New Orleans, 103 U. S. 358; 26 L. ed. 395.

[18] New Orleans Waterworks v. Louisiana Sugar Ref. Co., 125 U. S. 18; 8 Sup. Ct. Rep. 741; 31 L. ed. 607. In St. Paul Gaslight Co. v. St. Paul (181 U. S. 142; 21 Sup. Ct. Rep. 575; 45 L. ed. 788) this is declared to be "no longer open to question."

[19] Trustees of Dartmouth College v. Woodward, 4 Wh. 518; 4 L. ed. 629.

[20] 6 Cr. 87; 3 L. ed. 162.

[21] 7 Cr. 164; 3 L. ed. 303.

[22] 9 Cr. 43; 3 L. ed. 650.

This fundamental doctrine that the charter of a private corporation is a contract which, under the obligation clause, a State may not impair by legislation, though it has been much criticized, has never been departed from by the Supreme Court. In practical operation, however, its force has been much weakened not only by a very general practice upon the part of the States, when granting charters, to reserve the right to amend or revoke them,[23] but by later decisions of the courts with reference to the strictness with which the contractual elements of corporate charters are construed, and to the power of the States in the exercise of their police powers, their power of eminent domain, and their authority to control public service corporations, or corporate concerns affected with a public interest, to disregard even those charter rights which a strict construction shows to have been granted.

§ 498. Charter Grants Strictly Construed.

With reference to the strictness with which charter grants are to be construed the courts have laid down the doctrine that the State is to be held to have granted only such powers or immunities as are specifically or unequivocally stated, or as are necessarily and unavoidably implied therein. In Northwestern Fertilizing Co. v. Hyde Park[24] the court say: "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim."[25]

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[23] In some States the legislatures are without constitutional power to grant irrepealable or unamendable charters. This right of amendment or revocation, however, may not be so exercised as to deprive the corporation of property without due process of law.

[24] 97 U. S. 659; 24 L. ed. 1036.

[25] See also Charles River Bridge Co. v. Warren Bridge, 11 Pet. 420; 9 L. ed. 773; St. Clair County Turnpike Co. v. Illinois, 96 U. S. 63; 24 L. ed. 651; Oregon R. & Nav. Co. v. Oregonian R. Co., 130 U. S. 1; 9 Sup. Ct. Rep. 409; 32 L. ed. 837; Coosaw Mining Co. v. S. Carolina, 144 U. S. 550, 12 Sup. Ct. Rep. 689; 36 L. ed. 537; Knoxville Water Co. v. Knoxville, 200 U. S. 22; 26 Sup. Ct. Rep. 224; 50 L. ed. 353.

A few instances will sufficiently illustrate the strictness with which this doctrine is applied.

In a series of cases, property of corporations expressly exempted from taxation has nevertheless been held subject to taxation, where the original exemption did not unequivocally appear to be in the nature of a contract on the part of the State. Where this did not appear, the promised forbearance was held to be a mere gratuity, which might be withdrawn.[26]

In Knoxville Water Co. v. Knoxville[27] the court held that an agreement by a municipality to give to a water company an exclusive franchise for thirty years as against "any other person or corporation," did not prevent the corporation itself establishing, under subsequent legislative authority, its own independent system of waterworks.

§ 499. Charles River Bridge Co. v. Warren Bridge Co.

The Charles River Bridge Co. v. Warren Bridge Co.[28] case is another case in point. The facts of this famous case were these: The plaintiff company, under charter authority, had at great expense erected a bridge across the Charles River, over which it was authorized to charge tolls. The public interest seeming to demand it, the construction nearby of a second bridge was authorized, the immediate effect of which would, of course, be to divide the business of the first company and diminish its profits. The Supreme Court, by adopting the principle that all such charter grants are to be most strictly construed against the grantees, was able to hold that the charter to the first company not having expressly guaranteed an exclusive privilege, none was to be presumed. Chief Justice Taney, in his opinion, said: "The relative position of the Warren Bridge has already been described. It does not interrupt the passage over the Charles River Bridge, nor make the way to it or from it less convenient. None of the faculties or franchises

[26] Rector of Christ Church v. Philadelphia Co., 24 How. 300; 16 L. ed. 602; Tucker v. Ferguson, 22 Wall. 527; 22 L. ed. 805; R. R. Co. v. Board of Supervisors, 93 U. S. 595; 23 L. ed. 814.

[27] 200 U. S. 22; 26 Sup. Ct. Rep. 224; 50 L. ed. 353.

[28] 11 Pet. 420; 9 L. ed. 773.

[illegible]

§ [illegible]. Other Cases.

In Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.[illegible] it was held that the existence of a state law prohibiting the courts of the counties from licensing a ferry within a mile from an established ferry, did not constitute a contract with such an established ferry which might not constitutionally be impaired. This law, the court declared, "was a gratuitous proceeding on the part of the legislature by which a certain benefit was conferred upon existing ferries, but not accompanied by any conditions that made the act take the character of a contract. It was a matter of

[illegible] U. S. 287; 11 Sup. Ct. Rep. 301; 34 L. ed. 967.

ordinary legislation, subject to be repealed at any time when, in the judgment of the legislature, the public interest should require the repeal."

In C., M. & St. P. Railway Co. v. Minn.[30] it was held that a charter to a railway company, empowering it to make needful rules and regulations touching the rates of toll and the manner of collecting the same, did not deprive the State of its general authority to regulate the charges that might be collected by the company.

§ 501. Regulation of Charges of Public Service Corporations.

In the Railway Commission Cases[31] was involved the question as to the power of the States to bind themselves by charter contracts with reference to the control of the rates legally chargeable by public service corporations, and the circumstances under which they might be held so to have bound themselves. In these cases it was held that the grant of power by the State to directors of a railroad company to make by-laws, rules, and regulations for the management of its affairs did not exempt the company from subsequent statutory regulation of its business, and that the grant to the company of power "from time to time to fix, regulate, and receive the toll and charges" to be received by it for transportation, conferred only the power to fix reasonable charges, leaving the State free to declare what rates should be deemed reasonable. After stating that it was well settled that a State had the general power to limit the charges that might be exacted by railroad companies for the transportation of persons and property within its jurisdiction, the court say: "This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all, it can only be by words of positive grant or something which is in law equivalent. If there is any reasonable doubt it must be resolved in favor of the existence of the power."

With reference to the power granted to the company in its charter, "from time to time to fix, regulate and receive the toll

[30] 134 U. S. 418; 10 Sup. Ct. Rep. 462; 33 L. ed. 970.

[31] 116 U. S. 307; 6 Sup. Ct. Rep. 334; 29 L. ed. 636.

and charges by them to be received for transportation," the court declare that this authority is necessarily qualified by the common law obligation that all rates shall be reasonable. "Power is granted to fix reasonable charges, but what shall be deemed reasonable in law is nowhere indicated. There is no rate specified nor any limit set. Nothing whatever is said of the way in which the question of reasonableness is to be settled. All that is left as it was. Consequently, all the power which the State had in the matter before the charter, it retained afterwards. The power to charge being coupled with the condition that the charge shall be reasonable, the State is left free to act on the subject of reasonableness within the limits of its general authority as circumstances may require. The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered. If there had been any intention of surrendering this power it would have been easy to say so. Not having said so, the conclusive presumption is there was no such intention."[22]

§ 502. The Police Power and the Obligation of Contracts.

The extent of the power of the States in the exercise of their police powers to control the operations of domestic corporations as well as the strictness with which the charter grants are to be construed, is exhibited in the case of the Northwestern Fertilizing Co. v. Hyde Park,[23] decided in 1878. Here a charter had been granted giving the corporation the right for fifty years to establish and maintain at a designated place chemical and other works for the purpose of manufacturing and converting dead animals and other animal matter into agricultural fertilizers and other chemical products. Under this charter the company was organized, land purchased, and factories established. After some years, however, the village of Hyde Park grew up around these works, and the continued maintenance of the factory caused great discomfort to the villagers, and an ordinance was passed by the village in the

[22] Justices Harlan and Field filed dissenting opinions.
[23] 97 U. S. 659; 24 L. ed. 1036.

exercise of police power granted it by the State, forbidding the carrying of any offal or otherwise offensive or unwholesome matter through the village. As this was the only means through which the factory could obtain its raw material, the ordinance was disobeyed, and upon arrest and conviction of certain of its employees for so doing, the company filed a bill alleging that the obligation of the charter contract of the State with the company had been impaired, and praying that further prosecutions be enjoined. The Supreme Court of the State, upon appeal, dismissed the bill, whereupon a writ of error was taken to the Supreme Court of the United States. That tribunal upheld the validity of the ordinance in question, saying: "That a nuisance of a flagrant character existed, as found by the court below, is not controverted. We cannot doubt that the police power of the State was applicable and adequate to give an effectual remedy. That power belonged to the States when the federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that everyone shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions. The adjudged cases showing its exercise where corporate franchises were involved are numerous. . . . The charter was a sufficient license until revoked; but we cannot regard it as a contract guaranteeing it, in the locality originally selected, exemption for fifty years from the exercise of the police power of the State, however serious the nuisance might become in the future, by reason of the growth of population around it. The owners had no such exemption before they were incorporated, and we think the charter did not give it to them." [34]

The efficacy of the police power to alter or destroy charter contract rights was again illustrated in Stone v. Mississippi,[35] decided in 1880. In this case the plaintiff in error had been granted in 1867 the right to issue and vend lottery tickets. By the Constitu-

[34] A dissenting opinion was filed by Justice Strong.

[35] 101 U. S. 814; 25 L. ed. 1079.

tion of the State, adopted in 1869, the legislature was forbidden to authorize any lottery, and an information was filed by the Attorney-General of the State against Stone and his associates to show by what warrant or authority they exercised the franchise or privilege of issuing and vending lottery tickets. Upon error to the federal Supreme Court, it was held that the original grant of authority would not prevail against the subsequent exercise of the State's police power, the court saying: "The question is, therefore, directly presented, whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. . . . The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in the legal acceptance of the term, *mala in se,* but as we have just seen, may properly be made *mala prohibita.* They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, 'by the casting of lots, or by lot, chance, or otherwise,' might be 'awarded' to them from the accumulations of others. Certainly the right to stop them is governmental, to be exercised at all times by those in power at their discretion. Anyone, therefore, who

accepts a lottery charter, does so with the implied understanding that the people, in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the public good shall require, and this whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has, in legal effect, nothing more than a license to continue on the terms named for the specified time, unless sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control and withdrawal."

§ 503. Tax Exemptions.

Arguing from the fact that all charter contracts are presumed to be entered into with a knowledge and consent that they are, in their performance, subject to a legitimate exercise of the police power, the doctrine was early advanced that they are similarly subject to the State's taxing power; that, in other words, the power to tax is as necessarily and as inherently a sovereign power of the State and may not be bartered away, or its exercise in any way estopped. The courts have, however, held, as has been already intimated, that this is not so.

In many cases, though not without hesitation and against minority protests, exemptions from taxation granted by the State in return for some conceived substantial *quid pro quo* have been held contracts that might not thereafter be impaired. Such exemptions are, however, construed, it need not be said, with extreme strictness.

In Stone v. Mississippi[36] the court say: "We have held, not, however, without strong opposition at times, that this clause protected a corporation in its charter exemptions from taxation. While taxation is in general necessary for the support of government, it is not part of the government itself. Government was not organized for the purposes of taxation, but taxation may be neces-

[36] 101 U. S. 814; 25 L. ed. 1079.

[illegible] of government. As such, taxation becomes [illegible] of the legitimate functions of government [illegible]. No government dependent on taxation [illegible] its whole power of taxation, for [illegible] abdication. All that has been determined [illegible] for a consideration it may, in the exercise of [illegible] and for the public good, surrender a [illegible] in this particular."[illegible]

In [illegible] Theological Seminary v. Illinois[illegible] the court say: "The rule is that, in claims of exemption from taxation under legislative authority, the exemption must be plainly and unmistakably granted, [illegible] by implication only; a doubt is [illegible]." In Metropolitan Street R. Co. v. Tax Commissioners[illegible] it is said: "The rule is akin to, if not part of, the [illegible] universally accepted, that in grants from the public nothing passes by implication."[illegible]

[illegible] Chief Justice Chase and Justice [illegible] Miller [illegible] v. Rouse (8 Wall. 430; [illegible]): "We do not believe that any legislative body, sitting [illegible] has the right to sell, to [illegible] the taxing power of the State. This is a [illegible] necessary to the [illegible]. To hold then that any one of the [illegible] the State forever of the power of [illegible] the government which they are [illegible] is strictly lawful.

[illegible] in this view of the subject by the fact that a [illegible] by some of our predecessors, shows that [illegible] and referring to those [illegible] we content ourselves with [illegible] which we think must finally be [illegible]."

[illegible] U. S. [illegible] Sup. Ct. Rep. [illegible]; 47 L. ed. [illegible].

[illegible] U. S. [illegible] Sup. Ct. Rep. [illegible]; 50 L. ed. [illegible].

[illegible] Wells v. Mayor of Savannah, [illegible] U. S. 531; 21 Sup. Ct. Rep. [illegible]; [illegible] v. Ferguson, [illegible] Wall. 527; [illegible] L. ed. 805; Bank of Commerce v. Tennessee, [illegible] U. S. [illegible]; 16 Sup. Ct. Rep. 456; 40 L. ed. [illegible]; New York ex rel. Met. Street Ry. Co. v. Tax Commissioners, 199 U. S. [illegible] Sup. Ct. Rep. [illegible]; 50 L. ed. [illegible].

In this last cited case it was held that the company was not exempted from liability to payment of a special franchise tax by reason of the fact

§ 504. Impairment of Contracts by Taxation.

When, however, the States and their political subdivisions have endeavored to use their taxing power as an indirect means of avoiding explicit contract obligations, the Supreme Court has not hesitated to interpose its veto. Indeed, the court has said that attempted taxation has been the mode most frequently employed for the impairment of contracts.

Thus, in 1871, the city of Charleston by ordinance directed the city treasurer to retain out of the interest due on city stock a tax assessed on all the real and personal property in the city. This ordinance the Supreme Court in Murray v. Charleston[41] held void

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that in consideration of the payment of a gross sum or an annual percentage of its earnings it had been granted the right to construct and operate a street railway in the city of New York, such payments not having been specifically declared to be in lieu of all taxes. In its opinion the following is quoted with approval from the opinion of the court below:

"The franchises are grants which usually contain contracts, executed by the municipality, but executory as to the owner. They contain various conditions and stipulations to be observed by the holders of the privilege, such as payment of a license fee, of a gross sum down, of a specific sum each year, or a certain percentage of receipts, as a consideration, or 'in full satisfaction for the use of the streets.' There is no provision that the special franchise, or the property created by the grant, shall be exempt from taxation. . . .

"The condition upon which a franchise is granted is the purchase price of the grant, the payment of which in money, or by agreement to bear some burden, brought the property into existence, which thereupon became taxable at the will of the legislature, the same as land granted or leased by the state. There is no implied covenant that property sold by the State cannot be taxed by the State, which can even tax its own bonds, given to borrow money for its own use, unless they contain an express stipulation of exemption. The rule of strict construction applies to state grants, and unless there is an express stipulation not to tax, the right is reserved as an attribute of sovereignty. Special franchises were not taxed until, by the act of 1899, amending the tax law, they were added to the other taxable property of the State. This is all that the statute does, so far as the question now under consideration is concerned. No part of the grant is changed, no stipulation altered, no payment increased, and nothing exacted from the owner of the franchise that is not exacted from the owners of property generally. No blow is struck at the franchise, as such, for it remains with every right conferred in full force; but, as it is property, it is required to contribute its ratable share, dependent only upon value, toward the support of government."

[41] 96 U. S. 432; 24 L. ed. 760.

as an impairment of the obligation of the contract of the city with its creditors.[42]

§ 505. Instances of Incapacity of the States to Contract.

With reference, also, to various matters which, properly speaking, cannot be said to fall within the domain of the police power, the state legislatures have been held to be incompetent to contract.

[42] The court say: "We do not question the existence of a state power to levy taxes as claimed, nor the subordination of contracts to it, so far as it is unrestrained by constitutional limitation. But the power is not without limits, and one of its limitations is found in the clause of the federal Constitution, that no State shall pass a law impairing the obligation of contracts. A change of the expressed stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements, can no more be affected by an exertion of the taxing power than it can be by the exertion of any power of a state legislature. The constitutional provision against impairing contract obligations is a limit upon the taxing power, as well as upon all legislation, whatever form it may assume. Indeed, attempted state taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition. It most frequently calls for the exercise of our supervisory power. It may, then, safely be affirmed that no State, by virtue of its taxing power, can say to a debtor, 'You need not pay to your creditor all of what you have promised to him. You may satisfy your duty by retaining a part for yourself, or for some municipality, or for the state treasury.' Much less can a city say, 'We will tax our debt to you, and in virtue of the tax withhold a part for our use.' . . . Is, then, property which consists in the promise of a State, or of a municipality of a State, beyond the reach of taxation? We do not affirm that it is. A State may undoubtedly tax any of its creditors within its jurisdiction for the debt due to him, and regulate the amount of the tax by the rate of interest the debt bears, if its promise be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched. But until payment of the debt or interest has been made, as stipulated, we think no act of state sovereignty can work an exoneration from what has been promised to the creditor, namely: payment to him without a violation of the Constitution. 'The true rule of every case of property founded on contract with the government is this: it must first be reduced into possession, and then it will become subject, in common with other similar property, to the right of the government to raise contributions upon it. It may be said that the government may fulfill this principle by paying the interest with one hand, and taking back the amount of the tax with the other. But to this the answer is, that, to comply truly with the rule, the tax must be upon all the money of the community, not upon the particular portion of it which is paid to the public creditors, and it ought besides to be so regulated as not to include a lien of the tax upon the fund.

Thus in Newton v. Commissioner[43] it was declared, with reference to the location of a county seat, that one legislature could not bind its successors. So, also, in Illinois Central R. R. Co. v. Illinois[44] the Supreme Court held that the people of the State were, as a continuing whole, interested in the navigable waters of the State and in the lands under them, and that, therefore, the title to them was held in trust by the State and could not be ceded away.

In Munn v. Illinois[45] and in the Granger Cases,[46] the doctrine of the regulative power of the States over public service corporations, and those whose business is affected with a public interest, was established, and that this is a power the exercise of which is not to be construed as restrained by charter provisions except when it plainly appears that this has been intended. And, even when the grant is in unequivocal language, it will not be held valid against subsequent legislation as to matters which vitally or even seriously affect the public welfare, that is, relate to subjects within the field of legitimate police control. In this respect the protection of private rights under the due process clause and under the obligation clause is the same.

§ 506. Regulation of Rates.

With reference to the foregoing it is perhaps worthy of special mention that the right of public service corporations to fix their own charges or tolls is one which the legislature may grant, and, when granted, constitute a contract which the legislature may not

The creditor should be no otherwise acted upon than as every other possessor of moneys, and, consequently, the money he receives from the public can then only be a fit subject of taxation when it is entirely separated' (from the contract), 'and thrown undistinguished into the common mass.' 3 Hamilton, Works, 514 *et seq.* Thus only can contracts with the State be allowed to have the same meaning as all other similar contracts have."

[43] 100 U. S. 548; 25 L. ed. 710.

[44] 146 U. S. 387; 13 Sup. Ct. Rep. 110; 36 L. ed. 1018.

[45] 94 U. S. 113; 24 L. ed. 77.

[46] C. B. & Q. R. Co. v. Iowa, 94 U. S. 155; 24 L. ed. 94; Peik v. C. & N. Ry. Co., 94 U. S. 164; 24 L. ed. 97; C. M. & St. P. R. R. Co. v. Ackley, 94 U. S. 174; 24 L. ed. 99.

subsequently impair.[47] It does not need to be said, however, that this agreement upon the part of the State not to exercise its regulative power is one that must be explicitly stated. A general grant to the corporation of the power to fix, or alter its charges or tolls as it may think proper, is not an abdication by the State of its power of control.[48] Nor does a grant to the corporation of a power to fix its own rates, provided they are not unreasonable, have this effect;[49] nor does a grant of power to fix the charges, provided they be not in excess of a specified rate, prevent the State from later fixing a lower rate.[50] And, generally, the reservation by the State of a power to amend or revoke the charter, carries with it a power to regulate the charges that may be made.[51]

§ 507. Eminent Domain and the Obligation of Contracts.

That property of incorporated companies, like other species of property, are subject to the State's power of eminent domain, is not questioned. In Long Island Water Supply Co. v. Brooklyn[52] it is declared: "A contract is property, and, like any other property, may be taken under condemnation proceedings for public use. Its condemnation is of course subject to the rule of just compensation. . . . The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to the public uses." [53]

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[47] Los Angeles v. Los Angeles City Water Co., 177 U. S. 558; 20 Sup. Ct. Rep. 736; 44 L. ed. 886.

[48] Stone v. Ill. Cent. Ry. Co., 116 U. S. 347; 6 Sup. Ct. Rep. 348; 29 L. ed. 650.

[49] Chicago, etc., Ry. Co. v. Minn., 134 U. S. 418; 10 Sup. Ct. Rep. 462; 33 L. ed. 970.

[50] Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174; 9 Sup. Ct. Rep. 47; 32 L. ed. 377.

[51] Peik v. Chicago, etc., R. R. Co., 94 U. S. 164; 24 L. ed. 97.

[52] 166 U. S. 685; 17 Sup. Ct. Rep. 718; 41 L. ed. 1165.

[53] "Into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise, not out of the literal terms of the contract itself; they are superinduced by the preëxisting and higher authority of the laws of nature, or nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need

§ 508. The Construction of Contracts.

Under the obligation clause no general power is given to the federal Supreme Court to review the decisions of state courts as to the proper construction to be given to the terms of a subsisting contract. In Lehigh Water Co. v. Easton[54] the court say: "The argument in behalf of the company seems to rest upon the general idea that this court, under the statutes defining its appellate jurisdiction, may re-examine the judgment of the state court in every case involving the enforcement of contracts. But this view is unsound. The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which in our opinion is valid; it may judge a contract to be valid which in our opinion is void; or its interpretation of the contract may in our opinion be radically wrong; but in neither of such cases would the judgment be reviewable by this court under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the state Constitution, or some legislative enactment of the State, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question."

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never therefore be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract effected by it, but recognizes its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition. . . . A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction, thus attempted, we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right of private persons, in the use or enjoyment of their private property, to control, and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property."

The meaning to be given to a state law is primarily to be determined by the state courts, and, so long as only a question of state constitutional law is concerned, the meaning thus given is conclusive upon the federal courts. Thus, when a state statute is alleged to impair the obligation of a contract it is not the duty of the federal Supreme Court itself to construe the act and then to determine whether, as thus construed, it impairs the obligation of a contract; rather, its duty is to take the act as construed and applied by the courts of the State, and, upon that basis, to determine whether or not the obligation of contracts is impaired. The logic of this doctrine is apparent. Whatever may be the literal terms of a state law, if, in fact, it is not so construed by the state authorities as to work an impairment of contracts the inhibition of the obligation clause cannot be said to be violated.

§ 509. Existence of a Contract a Federal Question.

The rule is well established that the federal Supreme Court will determine for itself, that is, by its own independent judgment, whether or not that which is alleged to be a contract and to have been impaired by a state law is in truth a contract. That is to say, the federal tribunal does not hold itself bound by the decision of a state court which escapes from the application of the obligation clause by holding that the contract, the impairment of which is alleged, is not, in fact, a contract.

In Jefferson Branch Bank v. Skelly[55] the court say: "It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the supreme court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication of

[54] 121 U. S. 388; 7 Sup. Ct. Rep. 916; 30 L. ed. 1059.
[55] 1 Black, 436; 17 L. ed. 173.

the supreme court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract within the protection of the Constitution of the United States, and that the obligation should be enforced, notwithstanding a contrary conclusion by the supreme court of a State." [56]

This doctrine is, of course, applicable not only to the construction of instruments which, it is claimed, constitute contracts between individuals, but also to state laws which, it is alleged, amount to contracts on the part of the States. There has been no serious denial of this from the time of the early case of Fletcher v. Peck, in which it was held that the inhibition of the obligation clause applies as well to contracts on the part of the States as to those between private individuals.

§ 510. Constitutionality of State Laws Alleged to Impair Contracts a Federal Question.

Generally speaking, as is well known, the federal Supreme Court holds itself bound by the decisions of the state courts as to the constitutionality of state laws as determined by their respective state constitutions. This rule is, however, departed from in those cases in which it is conceived that it is necessary to do so in order to prevent the impairment of the obligation of contracts.

This refusal of the federal Supreme Court to follow the judgment of state courts takes the form: First, where the federal court refuses to hold itself bound by the opinion of the state tribunal as to the constitutionality of state laws which support or constitute essential elements of the contracts which, it is alleged, have been impaired by later legislation; and, Second, where the federal tribunal refuses to follow the decisions of state courts as to the constitutionality of state laws which in themselves constitute contracts upon the part of the States enacting them, and which contracts, it is alleged, have been impaired by subsequent enactments.

[56] In McCullough v. Virginia (172 U. S. 102; 19 Sup. Ct. Rep. 134; 43 L. ed. 382), it is declared that "the doctrine thus announced has been uniformly followed." City Bridge Proprietors v. Hoboken Land and Improvement Co., 1 Wall. 116; 17 L. ed. 571; Wright v. Nagle, 101 U. S. 791; 25 L. ed. 921; McGahey v. Virginia, 135 U. S. 662; 10 Sup. Ct. Rep. 972; 34 L. ed. 304.

The meaning to be given to a state law is primarily to be determined by the state courts, and, so long as only a question of state constitutional law is concerned, the meaning thus given is conclusive upon the federal courts. Thus, when a state statute is alleged to impair the obligation of a contract it is not the duty of the federal Supreme Court itself to construe the act and then to determine whether, as thus construed, it impairs the obligation of a contract; rather, its duty is to take the act as construed and applied by the courts of the State, and, upon that basis, to determine whether or not the obligation of contracts is impaired. The logic of this doctrine is apparent. Whatever may be the literal terms of a state law, if, in fact, it is not so construed by the state authorities as to work an impairment of contracts the inhibition of the obligation clause cannot be said to be violated.

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But where these decisions are in conflict, this court must determine between them. And certainly a Constitution acted on as undisputed for nearly fifty years by every department of the government, and supported by judicial decision, ought to be regarded as sufficient to give to the instrument a fixed and definite meaning. Contracts with the state authorities were made under it. And upon a question as to the validity of such a contract, the court, upon the soundest principles of justice, is bound to accept the construction it received from the state authorities at the time the contract was made." And, later, referring to the case of Rowan v. Runnels,[59] he says: "The court then said, that it would always feel itself bound to respect the decisions of the state courts, and from time to time as they were made, would regard them as conclusive in all cases upon the construction of their own Constitution and laws; but that it ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States which, in the judgment of this court, were lawful at the time they were made. It is true, the language of the court is confined to contracts with citizens of other States, because it was a case of that description which was then before it. But the principle applies with equal force to all contracts which were within its jurisdiction. . . . The sound and true rule is, that if the contract, when made, was valid by the laws of the State, as then expounded by all the departments of its governments, and administered in the courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts, altering the construction of the law."[60]

In later cases, coming to the Supreme Court by writ of error from the state courts, the same doctrine is declared and applied.[61]

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[59] 5 How. 134; 12 L. ed. 85.

[60] The last clause states a broader doctrine than has since been upheld with reference to cases coming to the federal Supreme Court by writ of error to the state courts. See *infra*.

[61] Jefferson Branch Bank v. Skelly, 1 Black, 436; 17 L. ed. 173; Louisiana v. Pillsbury, 105 U. S. 278; 26 L. ed. 1090; McGahey v. Virginia, 135 U. S. 662; 10 Sup. Ct. Rep. 972; 34 L. ed. 304; Mobile & Ohio R. R. Co. v. Ten-

§ 512. Doctrine in Cases Reaching the Supreme Court by Writs of Error to State Courts.

It is to be observed that all of these cases had reached the Supreme Court by writ of error to the state courts, and that the federal tribunal had been appealed to upon the ground that the contracts had been impaired by state laws enacted subsequent to the time they were entered into. Had there been no such legislation there would have been no constitutional basis for the exercise of the appellate jurisdiction of the federal court.

In New Orleans Waterworks Co. v. Louisiana Sugar Co.[62] the court say: "In order to come within the provision of the Constitution of the United States which declares that no State shall pass a law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of a State. The prohibition is aimed at the legislative power of the State and not at the decisions of its courts."

This doctrine is reaffirmed in Huntington v. Attrill[63] and again in Bacon v. Texas.[64] In this last case the court, summing up the doctrine, say: "Where the federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause of the Constitution, and so as to give this court jurisdiction on error to a state court, by some subsequent statute of the State which had been upheld or effect given it by the state court. . . . If the judgment of the state court gives no effect to the subsequent law of the State, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract. The above cited cases announce this principle."

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nessee, 153 U. S. 486; 14 Sup. Ct. Rep. 968; 38 L. ed. 793; Bacon v. Texas, 163 U. S. 207; 16 Sup. Ct. Rep. 1023; 41 L. ed. 132; McCullough v. Virginia, 172 U. S. 102; 19 Sup. Ct. Rep. 134; 43 L. ed. 382; Boyd v. Alabama, 94 U. S. 645; 24 L. ed. 302, it would seem to be *contra*.

[62] 125 U. S. 18; 8 Sup. Ct. Rep. 741; 31 L. ed. 607.

[63] 146 U. S. 657; 13 Sup. Ct. Rep. 224; 36 L. ed. 1123.

[64] 163 U. S. 207; 16 Sup. Ct. Rep. 1023; 41 L. ed. 132.

The same doctrine is repeated in Central Land Co. v. Laidley,[65] Hanford v. Davies,[66] and Weber v. Rogan.[67]

It would appear, however, that the Supreme Court has shown strong disposition to find, when possible, an impairing statute, and thus to justify its appellate jurisdiction for the protection of contracts in cases originating in the state courts. The cases of McCullough v. Virginia[68] and Muhlker v. New York and Harlem Railroad Co.[69] sufficiently illustrate this.

§ 513. McCullough v. Virginia.

McCullough v. Virginia was one of a number of cases coming before the Supreme Court of the United States growing out of the attempt of the State of Virginia to avoid the acceptance, in payment of certain dues to the State, of interest coupons to certain of its bonds, which coupons by the law providing for the issuance and sale of the bonds, it had agreed so to receive. After various devices, extending through a considerable period of years, had one after another been frustrated by the decisions of the Supreme Court of the United States declaring their unconstitutionality, during all of which time there had never been any question as to the constitutionality of the original law providing for the bonds and the acceptance by the State of the coupons in payment of public dues, and though the act had been repeatedly before the highest court of the State, that tribunal at last in McCullough v. Virginia declared that the coupon provision of the original act was in itself unconstitutional.

Inasmuch as the Virginia court in its decision did not consider the subsequent legislation of the State, but confined itself wholly to declaring the original act void, it was urged before the federal Supreme Court to which the case was brought on writ of error, that, by the decision of the state court, no subsequent legislative act had been applied, and, therefore, that the case was

[65] 159 U. S. 103; 16 Sup. Ct. Rep. 80; 40 L. ed. 91.
[66] 163 U. S. 273; 16 Sup. Ct. Rep. 1051; 41 L. ed. 157.
[67] 188 U. S. 10; 23 Sup. Ct. Rep. 263; 47 L. ed. 363.
[68] 172 U. S. 102; 19 Sup. Ct. Rep. 134; 43 L. ed. 382.
[69] 197 U. S. 544; 25 Sup. Ct. Rep. 522; 49 L. ed. 872.

not brought within the rule stated in New Orleans Waterworks Co. v. Louisiana Sugar Co. and Bacon v. Texas.

That court, however, upheld its jurisdiction, saying: "It is true that the [Virginia] court of appeals in its opinion only incidentally refers to statutes passed subsequent to the act of 1871, and places its decision distinctly on the ground that the act was void in so far as it related to the coupon contract, but at the same time it is equally clear that the judgment did give effect to the subsequent statutes, and it has been repeatedly held by this court that in reversing the judgment of the courts of a State we are not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision."

Whatever may have been the equities of the case, and regarding this there can be little doubt, the above reasoning seems scarcely satisfactory. Had there never been any subsequent legislation on the part of Virginia with reference to these coupons, the effect of the decision of the court of appeals of Virginia would have been exactly the same as that which in fact it did have, or rather would have had, had its judgment been affirmed. It is, therefore, difficult to see how its execution would have put subsequent legislation into force. To be sure, the same result was reached as that which would have been obtained had the later laws been enforced, but, certainly the result was not reached through their enforcement.[70]

§ 514. Muhlker v. N. Y. & H. Ry. Co.

In the Muhlker case, coming to the Supreme Court by writ of error from the supreme court of the State of New York, it was held that the owner of a piece of real property abutting on a street in New York who had acquired his title at a time when the state court had held that the owners of such abutting property had a right to easements of light, air and access, which could not be taken from them without compensation by an elevated railroad, was protected by the obligation clause from impairment of this right. An elevated railway, to be constructed,

[70] See the dissenting opinion of Justice Peckham.

owned, and operated by a private company, had been authorized by a state law of 1892, but the denial in the state court that this contract right had been thereby impaired was based not upon the assertion that the construction of the railway did not impair the plaintiff's contract right, but upon the ground that the earlier doctrine that he had a contract right at all was incorrect. It is thus apparent that, speaking at all strictly, the validity of the act of 1892 was not in question, that act merely providing for the erection of the railroad, and containing no provision one way or the other regarding compensation to abutting property-owners. The federal court, however, assumed jurisdiction on writ of error. After referring to the earlier state doctrine that there was a right to compensation, the court say: "When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation. And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it." [71]

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[71] In Sauer v. City of New York (206 U. S. 536; 27 Sup. Ct. Rep. 686; 51 L. ed. 1176) the facts were similar to those in the Muhlker case, except that the elevated structure was a viaduct for a purely public use, and the federal court held that the abutting property-owners had no contract right to compensation as against such a purely public use of the street, inasmuch as the earlier doctrine of the state courts had not been to that effect.

Commenting upon the McCullough and Muhlker cases, Professor W. F. Dodd in the *Illinois Law Review* (December, 1909) says: "They seem to warrant the statement that the federal Supreme Court will, in practically any case, be able to find a state statute to serve as a 'lay figure' in order to jus-

§ 515. Refusal of Federal Courts to Follow State Decisions Holding State Laws Void.

The cases which have been considered in the paragraphs which have gone immediately before have been ones in which there has been state legislation impairing contracts created by or resting upon prior statutes. In these cases the federal court has sought to determine for itself whether these earlier laws were constitutional as tested by the state constitutions of the States whose legislatures enacted them. We have now to turn to a class of cases in which the federal Supreme Court, without considering as an independent proposition the constitutionality of state laws, has refused to follow the decisions of the highest state courts holding them to be void, when to do so would be to render null contracts which have been entered into, the parties thereto relying in good faith upon the validity of such laws. Here, it is to be observed, the federal tribunal has not said that the state laws in question are to be treated as continuously constitutional and valid, that is, valid *in futuro,* the decisions of the state courts to the contrary notwithstanding, but only that, contracts which have been entered into in reliance upon them are not to be affected by their unconstitutionality. Thus, in effect, the position is taken that laws which are unconstitutional as judged by the state constitutions, and, therefore, void, may have a *de facto* character that will furnish a legal basis for contracts founded upon them.

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tify its taking jurisdiction over cases from state courts where contract rights are impaired by the reversal or modification of rules of law previously established by such courts. This practice may easily be extended to state cases passing upon for the first time and holding unconstitutional laws acted upon as valid, and under which contract rights had arisen before they were declared invalid; in just this manner was the rule of Gelpcke v. Dubuque extended so as to cover such cases as Hotel Co. v. Jones [see *infra,* Section 520] . . . A more logical view would be for the court to hold a judicial decision to be a 'law' in the technical sense, but the present attitude is better for the court, because it permits the Supreme Court to take or refuse jurisdiction as it pleases, while the holding of a decision to be a 'law' would operate to give an appeal to the Supreme Court as a matter of right from state decisions impairing the obligation of contracts."

§ 516. Distinction Between Cases Coming to the Supreme Court by Writs of Error to State Courts and Those Originating in Lower Federal Courts.

In passing upon decisions of state courts overruling their prior decisions and thereby invalidating contracts entered into in reliance upon such prior decisions, there is a sharp distinction drawn between those cases in which the cause comes before the federal courts because of the citizenship of the parties thereto, and thence by appeal to the Supreme Court and those coming to the Supreme Court by writs of error to the highest state courts.

In the latter class of cases the only ground of federal jurisdiction is that the obligation of a contract has been impaired; that, in other words, a right guaranteed by the federal Constitution has been violated. In McCullough v. Virginia, as in an unbroken line of previous cases, the members of the Supreme Court all agreed that federal jurisdiction exists only in case the decision of the state court appealed from has given effect to a state legislative act impairing a contract previously entered into. Their only disagreement in that case was as to whether, in fact, the decision of the Virginia court had given effect to legislation of this character.

§ 517. Cases Based on Diversity of Citizenship.

In those cases coming to the federal Supreme Court by way of appeal from a lower federal court there is no question of federal jurisdiction, and in them, the federal courts determine for themselves which, if any, of the decisions of the state courts dealing with the state laws or with principles involved they will follow.

In this class of cases, the federal jurisdiction over which is based upon the diversity of citizenship of the parties thereto, the doctrine is well established that where a state court has reversed its ruling as to the state law governing a case, the federal courts will not follow the later decision, when to do so will make it necessary to hold void or to impair the obligation of contracts previously entered into. In other words the first construction is treated as though it becomes a part of the law or constitutional

provision, and the later and differing construction as a law in amendment or appeal thereof. Thus in Burgess v. Seligman[72] the court say. "When contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, . . . the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."

Originally the Supreme Court went only so far as to protect a contract entered into under a law which had previously been held valid by the state courts, as against a later decision holding the law unconstitutional and void. Of late, however, as we shall see, the court has taken the further step of protecting contracts entered into under a law before its constitutionality has been upheld in the highest courts of the State; the argument necessarily being that a state legislative act is, even in advance of judicial affirmation, presumptively valid, and, therefore, that a later ruling of the courts to the effect that the law is invalid, operates to impair or destroy the obligation of the contracts which those entering into them have a right, at the time, to believe are legally enforceable agreements.

In these cases it is to be observed that the doctrine of the Supreme Court is not only to hold that the obligation clause warrants a refusal upon the part of the federal courts to follow the constructions given by state courts to their own state laws, but also to hold that a judicial decision is a "law" within the meaning of the provision of the federal Constitution that no State shall "pass any *law* impairing the obligation of contracts."

§ 518. Gelpcke v. Dubuque.

Disregarding the earlier case of Rowan v. Runnels[73] in which, though the point was involved and passed upon, the argument was not elaborated, the first important case in which the doctrine was clearly laid down that the federal courts need not follow the latest

[72] 107 U. S. 20; 2 Sup. Ct. Rep. 10; 27 L. ed. 359.

[73] 5 How. 134; 12 L. ed. 85.

decisions of the state courts construing state laws or constitutional provisions when to do so will be to impair the obligation of contracts entered into in reliance upon earlier decisions holding them void, was that of Gelpcke v. Dubuque,[74] decided in 1863. This case came up on appeal from a federal district court, and was a suit to recover upon certain bonds issued by the city of Dubuque, Iowa, which bonds had been issued under authority of an act of the state legislature. The constitutionality of this act had been upheld by the highest court of Iowa at the time the bonds were issued, but later decisions of that court had held the act unconstitutional, and, therefore, the bonds invalid. In its refusal to accept this last judgment of the Iowa supreme court, the federal Supreme Court did not base its refusal upon the ground that the construction was unsettled,[75] for in its opinion, after quoting from Leffingwell v. Warren[76] that it would follow the latest "settled" adjudications, the court say: "Whether the judgment in question can, under the circumstances, be deemed to come within that category, it is not now necessary to determine." The earlier decisions of the Iowa supreme court, the federal Supreme Court say, were reasonable ones, "sustained by reason and authority," and "in harmony with the adjudications of sixteen of the States of the Union." But not upon this ground, also, is the construction of the later decisions repudiated. The refusal to follow them is based explicitly upon the doctrine that, relying upon the earlier decision, contracts had been entered into which would be impaired should the later decisions be followed. "However we may regard the late case in Iowa as affecting the future," say the court, "it can have no effect upon the past. 'The sound and true rule is that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, the validity and obligation cannot be impaired by any subsequent action of legislation, or

[74] 1 Wall. 175; 17 L. ed. 520.

[75] As to the rule regarding this see Section 595.

[76] 2 Black, 599; 17 L. ed. 261.

decision of the courts altering the construction of the law.'[77] The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law."

It will be observed that in this case, though the earlier holding of the state supreme court as to the constitutionality of the act authorizing the bond was declared a reasonable one, it is not upon this ground that the later decision as to its unconstitutionality is repudiated. The relative merits of the earlier and the latest holding of the state court, as an abstract proposition, is not passed upon. It is not asserted that, except as to contracts entered into prior thereto, the state law declared void by the latest decision of the state court is to be treated as a nullity.

The doctrine declared in Gelpcke v. Dubuque has been much criticized upon the double ground that it treats a decision of a state court as a "law" impairing the obligation of contracts, and that it implies an assumption upon the part of the federal courts of a right not simply to apply impartially as between citizens of different States the state law as it finds it (this, it is claimed, being the sole reason for which federal jurisdiction in suits between citizens of different States is given), but to determine what that law is.

But however open to technical criticism, the doctrine has since been repeatedly affirmed and may now be considered beyond dispute.[78]

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[77] Quoted from Ohio Life Insurance & Trust Co. v. Debolt, 16 How. 416; 14 L. ed. 997.

[78] In Township of Pine Grove v. Talcott (19 Wall. 666; 22 L. ed. 227) the court say: "The national Constitution forbids the State to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decision than by legislation."

In Douglass v. County of Pike (101 U. S. 677; 25 L. ed. 968) the court say: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective not retrospective." See also Green Co. v. Conness, 109 U. S. 104; 3 Sup. Ct. Rep. 69; 27 L. ed. 872; Los Angeles v. Los Angeles Water Co., 177 U. S. 558; 20 Sup. Ct. Rep. 736; 44 L. ed. 886.

§ 519. Extension of the Doctrine of Gelpcke v. Dubuque.

According to the doctrine declared in the Gelpcke case, contract rights acquired under a law which has been held constitutional by the state courts will be protected by the federal courts from impairment by a later decision or decisions of those courts, in cases originating or brought into the lower federal courts because of the diversity of the citizenship of the parties litigant. In later cases this rule has been extended to cover cases where contract rights have been acquired under a state law, presumably valid, which have not had their constitutionality affirmed by the state courts.[79]

§ 520. Great Southern Fireproof Hotel Co. v. Jones.

In Great Southern Fireproof Hotel Co. v. Jones[80] the authorities are carefully reviewed, and the doctrine definitely stated that the federal courts will not hold themselves concluded by the decisions of state courts holding, though for the first time, state laws unconstitutional, in cases involving contract rights based upon such laws. That is to say, they will determine upon their own independent judgment whether the laws in question are to be held valid as tested by the state constitutions, and if, when so tested, the laws are not in their opinion valid, the contract rights based upon them fall to the ground. The situation is thus quite different from that of the cases arising under the Gelpcke v. Dubuque rule where there have been diverse opinions upon the part of the state courts. There the contract entered in reliance upon the first decisions upholding the laws concerned are protected without

[79] Havemeyer v. Iowa County, 3 Wall. 294; 18 L. ed. 38; Butz v. Muscatine, 8 Wall. 575; 19 L. ed. 490; Township of Pine Grove v. Talcott, 19 Wall. 666; 22 L. ed. 227; Pleasant Township v. Ætna Life Insurance Co., 138 U. S. 67; 11 Sup. Ct. Rep. 215; 34 L. ed. 864; Folsom v. Township, 159 U. S. 611; 16 Sup. Ct. Rep. 174; 40 L. ed. 278; Stanly County v. Coler, 190 U. S. 437; 23 Sup. Ct. Rep. 811; 47 L. ed. 1126; Great Southern Fireproof Hotel Co. v. Jones, 193 U. S. 532; 24 Sup. Ct. Rep. 576; 48 L. ed. 778.

[80] 193 U. S. 532; 24 Sup. Ct. Rep. 576; 48 L. ed. 778.

reference to the correctness of the earlier decisions as compared with the later.[81]

[81] In Hotel Co. v. Jones (193 U. S. 532; 24 Sup. Ct. Rep. 576; 48 L. ed. 778) the court say with reference to the general doctrine declared "the only exception to the general rule announced in the above cases arises when the question is whether a particular statute was passed by the legislature in the manner prescribed by the state construction, so as to become a law of the State." It is difficult to see why this exception is made, and, indeed, the authorities which are cited in its support are not appropriate, as in each case previously to the time when the contracts were entered into there had been state decisions with reference to similar laws, holding them void, and the parties thus advised of the doubtful validity of the laws upon which they relied.

CHAPTER XLIX.

CONSTITUTIONAL LIMITATIONS UPON THE TAXING POWERS OF THE STATES.

§ 521. Constitutional Provisions.

The federal Constitution lays but one express limitation upon the States with reference to the exercise of their taxing powers. This is that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing the inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States, and all such laws shall be subject to the revision and control of the Congress." [1]

But other clauses of the Constitution restricting generally the powers of the States operate to limit their powers of taxation. Thus, for example, influential in this respect are the provisions that no State shall deprive any person of property without due process of law or deny to any person within its jurisdiction the legal protection of the laws; that no State shall pass any law impairing the obligation of contracts; and that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Also there are the implied limitations that no State shall so use its taxing powers as to interfere with the operation of federal agencies; and that, being unable to give an extraterritorial effect to its laws, no State may tax property not within its jurisdiction.

The limitations imposed upon the taxing powers of the States by the "comity" clause[2] are discussed in chapter XII of this treatise. It may, however, be here said that, in general, the clause operates to prevent a State from burdening citizens of other States within its borders with heavier taxes than those laid upon its own

[1] Art. I, Sec. X, Cl. 2.
[2] Art. IV, § 2, Cl. 1.

citizens. This applies not only to the property of non-citizens but to the business that they may carry on.[3]

§ 522. Special Assessments.

The taxing by the State of private property in the form of taxes is held to be justified and not a taking of property for a public use without compensation, upon the theory that compensation is returned in the form of police protection and of other benefits flowing from the existence of the government. A logical extension of this justification permits the State to levy special taxes upon land embraced within a given district where the proceeds of such taxes are to be spent for improvements which, though of general public utility, are yet for the special and peculiar benefit of that district. For, as the court say in Lockwood v. St. Louis,[4] "While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the benefit of the few. . . . General taxation for a mere local purpose is unjust; it burdens those who are not benefited and benefits those who are exempt from the burden."

In similarity to this principle that the property peculiarly benefited by a public improvement may be called upon, by a special assessment, to bear the cost thereof, is the principle that, in assessing the damages, when private property is taken for a public purpose under an exercise of the right of eminent domain, the resulting benefits to the owner from the public use to which his appropriated property is part may be subtracted from the value of the property taken. This right thus to set off benefits was denied by the court of appeals of the District of Columbia in several cases, but the Supreme Court of the United States, in Bauman v. Ross[5] emphatically repudiated the doctrine saying: "The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation [of his property]. He is entitled to receive the value of what he has been deprived of and no more. To award

[3] Ward v. Maryland, 12 Wall. 418; 20 L. ed. 449.

[4] 24 Mo. 20.

[5] 167 U. S. 548; 17 Sup. Ct. 966; 42 L. ed. 270.

him more would be unjust to the public. Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered."

§ 523. Taxes and Special Assessments Distinguished.

Special assessments are, properly speaking, taxes, and yet they are of so peculiar a character that the courts have not infrequently refused to bring them within the meaning of the term "tax." Thus where certain corporations or pieces of property have been by law exempted from taxation, they have, nevertheless, been held subject to special assessments.[6] Again, where state Constitutions have provided that taxation shall be equal and uniform, or that all property shall be taxed according to its value, the courts have nevertheless held that special assessments for local improvements may be levied and assessed according to the front-foot rule or by a standard other than that of value.

Judge Cooley quotes the following from the decision of a Mississippi court in illustration of the distinction between a tax and a special assessment:

"A local assessment can only be levied on land, it cannot, as a tax can, be made a personal liability of the taxpayer; it is an assessment on the thing supposed to be benefited. A tax is levied upon the whole state or a known political subdivision as a county or town. A local assessment is levied upon property situated in a district created for the express purpose of the levy and possessing no other function or even existence than to be the thing upon which the levy is made. A tax is a continuing burden and must be collected at short intervals for all time and without it government cannot exist; a local assessment is exceptional both as to time and locality, it is brought into being for a particular occasion and to accomplish a particular purpose and dies with the passing of the occasion and the accomplishment of the purpose. A tax is

[6] Lefevre v. Detroit, 2 Mich. 586; Ill. Cent. R. Co. v. Decatur, 126 Ill. 92. See *Mich. Law Review*, II, 455.

levied, collected, and administered by a public agency, elected by and responsibile to the community upon which it is imposed; a local assessment is made by an authority *ab extra*. Yet it is *like* a tax in that it is imposed under an authority derived from the legislature, and is an enforced contribution to the public welfare, and its payment may be enforced by the summary method allowed for the collection of taxes. It is *like* a tax in that it must be levied for a public purpose and must be apportioned by some reasonable rule among those upon whose property it is levied. It is *unlike* a tax in that the proceeds of the assessment must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must inure to the property upon which it is imposed." [7]

§ 524. Constitutional Requirements of Special Assessments.

The power of the legislature to establish special taxing districts upon the lands within which a special tax is to be levied, assessed, and collected is limited by the following rules: (1) There must be some reasonable ground for grouping into a single district the lands composing it, and this reasonable ground must, as has been seen, be that the lands in question will derive special benefit from the public improvement to meet the expenses of which the tax is levied. It follows, therefore, as of course, that the proceeds of the tax may not be used for any other purpose. (2) The tax so levied must be assessed according to a rule uniformly applied throughout the district, which, in its actual operation, will fairly distribute the tax among the several pieces of property affected according to the benefits received or to be received from the public improvement which is undertaken. Whether or not the assessments may be in excess of the benefits is a question to be presently considered, but in any case they must be apportioned generally according to the benefits. By this is not meant that this apportionment must be absolutely exact. This, in most cases, is an impossibility. But, generally speaking, the part of the entire tax borne by each piece of land must agree with the part of the entire benefit received.[8]

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[7] George, C. J., in Macon v. Patty, 57 Miss. 378.

[8] In Union Refrigerator Transit Co. v. Kentucky (199 U. S. 194; 26 Sup. Ct. Rep. 36; 50 L. ed. 150) the court say:

§ 525. Resort to Special Assessments Discretionary with the Legislature.

When a public improvement is to be undertaken which will result in special benefit to a particular district, it is not obligatory upon the legislature to levy a special assessment upon that district for the purpose. Whether or not it will do so lies within its free discretion. Also the fact that the proposed improvement will be, to a certain extent, of general benefit to the whole community, does not render invalid a special assessment upon the district specially benefited.

In Bauman v. Ross,[9] with reference to an act of Congress relating to the District of Columbia, it was contended by some of the owners of lands that the public improvement proposed was not of a local character, but was for the advantage of the whole country, and should be paid for by the United States, and not by the District of Columbia, or by the owners of the lands affected by the improvement. The court, however, said: "It is for the legislature, and not the judiciary, to determine whether the expense of a public improvement should be borne by the whole State, or by the district or neighborhood immediately benefited. The case,

"But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus, every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal property to be guarded; or of a road tax, though he never use the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. Even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is extremely doubtful whether a particular lot can receive any benefit from the improvement does not invalidate the tax with respect to such lot. Kelly v. Pittsburgh, 104 U. S. 78; 26 L. ed. 658; Amesbury Nail Factory Co. v. Weed, 17 Mass. 53; Thomas v. Gay, 169 U. S. 264; 18 Sup. Ct. Rep. 340; 42 L. ed. 740; Louisville & N. R. Co. v. Barber Asphalt Paving Co., 197 U. S. 430; 25 Sup. Ct. Rep. 466; 49 L. ed. 819. Subject to these individual exceptions the rule is that in classifying property for taxation some benefit to the property taxed is a controlling consideration, and a plain abuse of this power will sometimes justify a judicial interference. Norwood v. Baker, 172 U. S. 269; 19 Sup. Ct. Rep. 187; 43 L. ed. 443."

[9] 167 U. S. 548; 17 Sup. Ct. Rep. 966; 42 L. ed. 270.

in this respect, comes within the principle upon which this court held that the legislature of Alabama might charge the county of Mobile with the whole cost of an extensive improvement of Mobile harbor; and, speaking by Mr. Justice Field, said: 'The objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless constrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties or other particular subdivisions of the state, or lay the greater share or the whole upon that county or portion of the state specially and immediately benefited by the expenditure.'" [10]

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[10] Citing Mobile County v. Kimball, 102 U. S. 691; 26 L. ed. 238. The opinion continues:

"The legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street, to be assessed upon the owners of the land benefited thereby. Davidson v. New Orleans, 96 U. S. 97; 24 L. ed. 616; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701; 4 Sup. Ct. Rep. 663; 28 L. ed. 569; Spencer v. Merchant, 125 U. S. 345; 8 Sup. Ct. Rep. 921; 31 L. ed. 763; Walston v. Nevin, 128 U. S. 578; 9 Sup. Ct. Rep. 192; 32 L. ed. 544; Lent v. Tillson, 140 U. S. 316; 11 Sup. Ct. Rep. 825; 35 L. ed. 419; Illinois C. R. Co. v. Decatur, 147 U. S. 190; 13 Sup. Ct. Rep. 293; 37 L. ed. 132; Paulsen v. Portland, 149 U. S. 30; 13 Sup. Ct. Rep. 750; 37 L. ed. 637. This authority has been repeatedly exercised in the District of Columbia by Congress, with the sanction of this court. Willard v. Presbury, 14 Wall. 676; 20 L. ed. 719; Mattingly v. District of Columbia, 97 U. S. 687; 24 L. ed. 1098; Shoemaker v. United States, 147 U. S. 282; 13 Sup. Ct. Rep. 361; 37 L. ed. 170.

"The class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited. Spencer v. Merchant, and Shoemaker v. United States, above cited; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112; 17 Sup. Ct. Rep. 56; 41 L. ed. 369; Ulman v. Baltimore, 165 U. S. 719; 17 Sup. Ct. Rep. 1001; 41 L. ed. 1184. See also the very able opinion of the court of appeals of New York, delivered by Judge Ruggles, in People v. Brooklyn, 4 N. Y. 419.

§ 526. Special Assessments in Excess of Benefits.

It has been seen that the justification for a special assessment is the special benefits received. Logically and justly, it would seem, therefore, that such special assessments should in no case be permitted to exceed, to any substantial extent at least, the benefits which justify them. In fact, however, until recently at least, the rule appears to have been that, so long as they are apportioned according to benefits, they are not necessarily measured in absolute amount by such benefits. Thus, for example, in Bauman v. Ross,[11] cited above, in which was involved a law which provided that one-half of the amount measured as damages for the taking of the lands needed for the improvement contemplated should be assessed upon the lands benefited, no proviso appeared to meet cases in which the assessments thus provided for might exceed the benefits conferred; yet the court declared: "This fixing of the gross sum to be assessed was within the authority of Congress."

§ 527. Doctrine of Norwood v. Baker.

In 1898, however, was decided the case of Norwood v. Baker,[12] which seemed to state a new doctrine. The facts in this case were

"The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners. Mattingly v. District of Columbia; Spencer v. Merchant; Watson v. Nevin; Shoemaker v. United States; Paulsen v. Portland, and Fallbrook Irrig. Dist. v. Bradley, above cited.

"If the legislature, in taxing lands benefited by a highway, or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law. Davidson v. New Orleans; Spencer v. Merchant; Watson v. Nevin; Lent v. Tillson; Paulsen v. Portland, and Fallbrook Irrig. Dist. v. Bradley, above cited.

"The whole sum directed by § 15 to be assessed upon lands benefited is one-half of 'the amount awarded by said court as damages for each highway or reservation, or part thereof, condemned and established under this act.' This fixing of the gross sum to be assessed was clearly within the authority of Congress, according to the above cases."

[11] 167 U. S. 548; 17 Sup. Ct. Rep. 966; 42 L. ed. 270.

[12] 172 U. S. 269; 19 Sup. Ct. Rep. 187; 43 L. ed. 443.

these: By an ordinance of the village of Norwood a street was cut through the land of a Mrs. Baker, and a special assessment levied upon her equaling in amount not simply the value of the land taken, but, in addition thereto, the costs and expenses connected with the condemnation proceedings. Only the lands of Mrs. Baker were affected by the ordinance. The validity of this assessment was contested, not on the ground that it would in fact impose a tax in excess of the benefit received, but that the amount of the assessment to be paid, namely, a sum equal to the amount paid for the land taken for the street, together with the cost of the condemnation proceedings, was fixed without any relation to the benefits to be received. It would seem that to this contention it might have been replied that inasmuch as but one piece of land was concerned it was not possible to lay down a *rule* of apportionment. The court, however, went beyond this and held, apparently, that in all cases a special assessment is *prima facie* invalid which casts upon abutting property the cost of an improvement, without reference to the benefits received. After admitting that the principle is well established, that abutting owners may be subjected to special assessments to meet the expense of opening public highways in front of their property, the majority of the court in their opinion say: "But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go, consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and, therefore, the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legis-

lature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and, therefore, should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum, representing the whole cost of the improvement, and without any right in the property-owner to show, when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received.

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable; and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity, when its aid is invoked to restrain the enforcement of a special assessment." . . .

The reasoning of the court, as shown in the quoted paragraphs, is not perfectly clear, but the argument would seem to be that inasmuch as the assessments may never constitutionally exceed the amount of the benefits, therefore the assessment in question was illegal because no opportunity was provided for showing that in fact the benefits were exceeded, or that if this were shown, no provision was made for the reduction of the assessment.[13]

[13] In a dissenting opinion concurred in by three justices, after citing authorities as to the discretionary power vested in a legislature to establish special taxing districts, it is said:

"The legislative act charging the entire cost of an improvement upon certain described property is a legislative determination that the property described constitutes the area benefited, and also that it is benefited to the extent of such cost. It is unnecessary to inquire how far courts might be justified in interfering in a case in which it appeared that the legislature had attempted to cast the burden of a public improvement on property remote therefrom, and obviously in no way benefited thereby; for here the prop-

§ 528. Norwood v. Baker Explained and Limited by La Cases.

The decision in the case of Norwood v. Baker was for a ti extraordinarily disconcerting. For if, as the case seemed to h a special assessment according to some uniform rule of assessm such as the front-foot rule, could not be applied until it had b determined, after a hearing, that it would not impose upon particular piece of property a tax in substantial excess of

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erty charged with the burden of the improvement is that abutting upon s improvement,— the property *prima facie* benefited thereby,— and the auth ties which I have cited declare that it is within the legislative power determine the area of the property benefited, and the extent to which i benefited. It seems to me strange to suggest that an act of the legislat or an ordinance of a city, casting, for instance, the cost of a sewer or s walk in a street upon all the abutting property, is invalid, unless it prov for a judicial inquiry whether such abutting property is in fact benefi and to the full cost of the improvement, or whether other property might also be to some degree benefited, and therefore chargeable with part of cost. . . .

". . . Here the plaintiff does not allege that her property was not b fited by the improvement, and to the amount of the full cost thereof; does allege any payment or offer to pay the amount properly to be charged u it for the benefits received, or even express a willingness to pay what courts shall determine ought to be paid. On the contrary, so far as record discloses, either by the bill or her testimony, her property may l been enhanced in value ten times the cost of the condemnation.

"The testimony is equally silent as to the matter of damages and bene There is not only no averment, but not even a suggestion, that any o property than that abutting on the proposed improvement, and belongin plaintiff, is in the slightest degree benefited thereby. Nor is there an a ment or a suggestion that her property, thus improved by the opening street, has not been raised in value far above the cost of improvement. that a legislative act charging the cost of an improvement in laying o street (and the same rule obtains if it was the grading, macadamizing paving the street) upon the property abutting thereon is adjudged, not not conclusive that such abutting property is benefited to the full cost the but, further, that it is not even *prima facie* evidence thereof, and that, be such an assessment can be sustained, it must be shown, not simply that legislative body has fixed the area of the taxing district, but, also, tha suitable judicial inquiry it has been established that such taxing distric benefited to the full amount of the cost of the improvement, and also no other property is likewise benefited. The suggestion that such an as ment be declared void, because the rule of assessment is erroneous, im that it is *prima facie* erroneous to cast upon property abutting upon an provement the cost thereof; that a legislative act casting upon such abut

benefit conferred by the improvement upon that property, the practice and procedure of special assessments throughout the country would in many cases have to be revised.

In a series of cases, decided in 1901, however, the court brought back the law very nearly, if not quite, to its former condition. The chief opinion is rendered in French v. Barber Asphalt Paving Co.[14] In this case it was held that the apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage, without any judicial inquiry as to their value or the benefits they received, might be authorized by the legislature. In its opinion the court review at length the scope and effect given in previous cases to the phrase "due process of law" in its application to the taxing power, and, coming to the case of Norwood v. Baker say, in effect, that that case was a peculiar one, relating to a single piece of property, and that the decree of the court was not based upon a general principle of law that an assessment cannot be levied without provision for a preliminary hearing as to the benefits, but simply, that the particular assessment then before the court was not a proper one. "Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question."[15]

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property the full cost of an improvement is *prima facie* void; that, being *prima facie* void, the owner of any property so abutting on the improvement may obtain a decree of a court of equity canceling *in toto* the assessment, without denying that his property is benefited by the improvement, or paying, or offering to pay, or expressing a willingness to pay, any sum which may be a legitimate charge upon the property for the value of the benefit to it by such improvement.

"In this case no tender was made of any sum, no offer to pay the amount properly chargeable for benefits, there was no allegation or testimony that the legislative judgment as to the area benefited, or the amount of the benefit, was incorrect, or that other property was also benefited; and the opinion goes to the extent of holding that the legislative determination is not only not conclusive, but also is not even *prima facie* sufficient, and that in all cases there must be a judicial inquiry as to the area in fact benefited. We have often held the contrary, and, I think, should adhere to those oft-repeated rulings."

[14] 181 U. S. 324; 21 Sup. Ct. Rep. 625; 45 L. ed. 879.

[15] In a dissenting opinion, rendered by Justice Harlan, and concurred in by Justices White and McKenna, it is argued, and with force, that the doctrine declared in the case at bar does in fact modify that declared in Norwood v. Baker. The argument is, however, too long to be quoted.

In Tonawanda v. Lyon[16] practically the same facts as those in French v. Barber Asphalt Paving Co. were involved. In the majority opinion, with reference to the Norwood v. Baker case, it is said: "It was not the intention of the court, in that case, to hold that the general and special taxing systems of the States, however long existing and sustained as valid by their courts, have been subverted by the Fourteenth Amendment. . . . The case of Norwood v. Baker presented, as the judge in the court in the present case well said, 'considerations of peculiar and extraordinary hardships' amounting in the opinion of a majority of the judges of this court, to actual confiscation of private property to public use, and bringing the case fairly within the reach of the Fourteenth Amendment."

In Wight v. Davidson,[17] decided at the same time as Tonawanda v. Lyon and French v. Barber Asphalt Paving Co., the objection was raised to an act of Congress relating to the District of Columbia, that it arbitrarily fixed the amount of benefits to be assessed upon the property, irrespective of the amount of benefits actually received or conferred upon the land assessed by the opening of a street. The lower court, in its opinion, had said with reference to Norwood v. Baker, "As we understand that decision, which undoubtedly has the effect of greatly qualifying the previous expressions of the same high tribunal upon the matter of special assessments, the limit of assessment on the private owner of property is the value of special benefit which was accrued to him for the public improvement adjacent to his property." As to this construction thus placed upon its position the Supreme Court say:

"We think the court of appeals in regarding the decision in Norwood v. Baker as overruling our previous decisions . . . misconceived the meaning and effect of that decision. There the question was as to the validity of a village ordinance which imposed the entire cost and expenses of opening a street, irrespective of the question whether the property was benefited by the opening of the street. The legislature of the State had not defined or desig-

[16] 181 U. S. 389; 21 Sup. Ct. Rep. 609; 45 L. ed. 908.

[17] 181 U. S. 371; 21 Sup. Ct. Rep. 616; 45 L. ed. 900.

nated the abutting property as benefited by the improvement, nor had the village authorities made any inquiry into the question of benefits. There having been no legislative determination as to what lands were benefited, no inquiry instituted by the village councils, and no opportunity afforded to abutting owners to be heard on the subject, this court held the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him, is, *to the extent of such excess,*[18] a taking under guise of taxation of private property for public use, without compensation." [19]

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[18] Italics are by the court.

[19] In an earlier chapter it has been shown that the requirement of the Fifth Amendment that no person shall be deprived of property without due process of law lays the same obligation upon the Federal Government as that imposed by the same words of the Fourteenth Amendment upon the States. It is rather surprising, therefore, to find the Supreme Court in Wight v. Davidson (181 U. S. 371; 21 Sup. Ct. Rep. 616; 45 L. ed. 900) in its efforts to distinguish that case from Norwood v. Baker (172 U. S. 269; 19 Sup. Ct. Rep. 187; 43 L. ed. 443), saying: "In the present case is involved the constitutionality of an act of Congress regulating assessments on property in the District of Columbia in respect to which the jurisdiction of Congress in matters municipal as well as political, is exclusive, and not controlled by the provisions of the Fourteenth Amendment. No doubt, in the exercise of such legislative powers, Congress is subject to the provisions of the Fifth Amendment to the Constitution of the United States, which provides, among other things, that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation. But it by no means necessarily follows that a long and consistent construction put upon the Fifth Amendment, and maintaining the validity of acts of Congress relating to public improvements within the District of Columbia, is to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment as controlling state legislation." In a dissenting opinion filed by Justice Harlan and concurred in by Justices White and McKenna, it is said with reference to the observations above quoted from the majority opinion: "I refer to this part of its (the Court's) opinion only for the purpose of recording my dissent from the intimation that what a State might not do in respect of the deprivation of property without due process of law, Congress under the Constitution could, perhaps, do in respect of property in this District. . . . It is inconceivable to me that the question whether a person has been deprived of property without due process of law can be determined upon principles applicable to the Fourteenth Amendment, but not applicable to the Fifth Amendment, or upon principles applicable under the Fifth Amendment, and not applicable under the Fourteenth Amendment. It

As declared by Justice Harlan in his dissenting opinion, in French v. Barber Asphalt Paving Co., it is uncertain whether or not the court intended definitely to repudiate the doctrine that a special assessment upon a piece of property in substantial excess of the benefits conferred upon that property by the improvement, is a taking of property without due process of law. This uncertainty became still more evident by the decisions of the court in Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co.,[20] decided in 1905, and Martin v. District of Columbia,[21] decided in 1907.

The first case was a proceeding under a Kentucky statute to enforce a lien upon a lot for grading, curbing, and paving a carriage highway. The plaintiff in error pleaded that its only interest in the lot was for a right of way for a railroad, and that neither this right of way nor the lot would or could get any benefit from the improvement, but that, on the contrary, the property would be injured by the increase of travel close to the plaintiff's tracks. To the argument that this assessment was, therefore, in violation of the Fourteenth Amendment, the Supreme Court, however, answered that the reasoning assumed an exactness in the premises which did not exist. The amount of benefit which a piece of property will derive from a public improvement is, it is declared, a matter of forecast and estimate, not of direct and exact statement. "In its general aspects, at least, it is peculiarly a thing to be decided by those who make the laws." The court then go on to state the doctrine, which it declares to have been implied in the earlier cases, that so long as an act is in general fair and just, it is not rendered invalid by the fact that, as to particular areas, the benefits are less than the assessments. "If a particular case of hardship arises under it in its natural and ordinary application that hardship must be borne as one of the imperfections of human things."

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seems to me that the words 'due process of law' mean the same in both Amendments. The intimidation to the contrary in the opinion of the court is, I take leave to say, without any foundation upon which to rest, and is most mischevious in its tendency."

[20] 197 U. S. 430; 25 Sup. Ct. Rep. 466; 49 L. ed. 819.

[21] 205 U. S. 135; 27 Sup. Ct. Rep. 440; 51 L. ed. 743.

In Martin v. District of Columbia[22] was involved a law of Congress relating to the District of Columbia providing for the opening of alleys and the assessment of damages upon the lots in the squares concerned. Contest was made by certain lot owners that their properties would not be benefited, at least to the extent of the assessments, by the opening of alleys. The court, after referring to the terms of the law, say:

"The law is not a legislative adjudication concerning a particular place and a particular plan, like the one before the court in Wight v. Davidson, 181 U. S. 371; 21 Sup. Ct. Rep. 616; 45 L. ed. 900. It is a general prospective law. The charges in all cases are to be apportioned within the limited taxing district of a square, and therefore it well may happen, it is argued, that they exceed the benefit conferred, in some case of which Congress never thought and upon which it could not have passed. The present is said to be a flagrant instance of that sort. If this be true, perhaps the objection to the act would not be disposed of by the decision in Louisville & N. R. Co. v. Barber Asphalt Paving Co., 197 U. S. 430; 25 Sup. Ct. Rep. 466; 49 L. ed. 819. That case dealt with the same objection, to be sure, in point of form, but a very different one in point of substance. The assessment in question there was an assessment for grading and paving, and it was pointed out that a legislature would be warranted in assuming that grading and paving streets in a good-sized city commonly would benefit adjoining land more than it would cost. The chance of the cost being greater than the benefit is slight, and the excess, if any, would be small. These and other considerations were thought to outweigh a merely logical and mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation. It was emphasized that there should not be extracted from the very general language of the 14th Amendment, a system of delusive exactness and merely logical form.

"But when the chance of the cost exceeding the benefit grows large, and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent. Constitu-

[22] 205 U. S. 135; 27 Sup. Ct. Rep. 440; 51 L. ed. 743.

tional rights like others are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation and a taking by eminent domain. So it well might be that a form of assessment that would be valid for paving would not be valid for the more serious expenses involved in the taking of land. Such a distinction was relied on in French v. Barber Asphalt Paving Co. (181 U. S. 324; 21 Sup. Ct. Rep. 625; 45 L. ed. 879) to reconcile the decision in that case with Norwood v. Baker (172 U. S. 269; 19 Sup. Ct. Rep. 187; 43 L. ed. 443)."

But it is evident that the court itself felt that a position was being taken which could not be clearly harmonized with earlier cases, for the opinion continues:

"And yet it is evident that the act of Congress under consideration is very like earlier acts that have been sustained. That passed upon in Wight v. Davidson, it is true, dealt with a special tract, and so required the hypothesis of a legislative determination as to the amount of benefit conferred. But the real ground of the decision is shown by the citation of Bauman v. Ross (167 U. S. 548; 17 Sup. Ct. Rep. 966; 42 L. ed. 270), when the same principle was sustained in a general law. It is true again that in Bauman v. Ross the land benefited was to be ascertained by the jury instead of being limited by the statute to a square; but it was none the less possible that the sum charged might exceed the gain. As only half the cost was charged in that case it may be that, on the practical distinction to which we have adverted in connection with Louisville & N. R. Co. v. Barber Asphalt Paving Co. the danger of such an excess was so little that it might be neglected, but the decision was not put on that ground.

"In view of the decisions to which we have referred it would be unfortunate if the present act should be declared unconstitutional after it has stood so long. We think that without a violent construction of the statute it may be read in such a way as not to raise the difficult question with which we have been concerned. It is true that the jury is to apportion an amount equal to the

amount of the damage ascertained, but it is to apportion it 'according as each lot or part of lot of land in such square may be benefited by the opening, etc.' Very likely it was thought in general, having regard to the shortness of the alleys, the benefits would be greater than the cost. But the words quoted permit, if they do not require, the interpretation that in any event the apportionment is to be limited to the benefit, and if it is so limited all serious doubt as to the validity of the statute disappears."

§ 529. Summary.

Summarizing the result, or rather the tendency of the cases reviewed, it would appear that the Supreme Court has drawn away from the doctrine stated in its earlier cases that a special assessment will be upheld if apportioned according to a rule which, in its general operation, distributes the burden of the tax in proportion to the benefits received, even though such assessments may, as to particular pieces of property, be in substantial excess of the benefits received. In place of this doctrine the court, though with considerable falterings, has declared that "when the chance of the cost exceeding the benefit grows large, and the amount of the not improbable excess is great" the assessment will not be sustained. Except in such extreme cases, however, the legislative determination as to the propriety of the assessment and of the mode of its apportionment will be held controlling.

§ 530. Property Taxed Must Be Within the Jurisdiction of the State.

By reason of the due process clause of the Fourteenth Amendment, and as a result from the fact that no State may give extraterritorial force to its laws, the States of the Union are constitutionally disqualified from levying taxes upon property without their several territorial jurisdictions. This principle, simple and absolute in itself, often becomes, however, difficult of application because of the difficulty in determining, in certain cases, when a given piece of property may be legally considered within the juris-

diction of the State attempting to tax it. This difficulty is illustrated in the sections which follow.

§ 531. Personal Liability of the Property Owners.

The right to tax depending upon the actual or constructive presence within the jurisdiction of the property taxed, and the tax thus operating *in rem* rather than *in personam* against the owner, it follows that, strictly speaking, the owner, not domiciled in the State, cannot be made personally liable for the tax.[23] Thus in Dewey v. City of Des Moines,[24] decided in 1899, was held void a state statute authorizing special assessments for local improvements and attempting to make non-resident lot owners personally liable for such assessments, the court saying: "The principle which renders void a statute providing for the personal liability of a non-resident to pay a tax of this nature is the same which prevents a State from taking jurisdiction through its courts by virtue of a statute, over a non-resident not served with process within the State, to enforce a mere personal liability, and where no property of the non-resident has been seized or brought under the control of the court. . . . A judgment, without personal service against a non-resident, is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a non-resident further than respects the property so taken. This is as true in the case of an assessment against a non-resident of such a nature as this one as in the case of a more formal judgment."

In Corry v. Baltimore,[25] decided in 1905, a law of Maryland was upheld which provided that stock in domestic corporations held by non-residents might be taxed, the tax to be paid by the

[23] So far as a tax operates upon persons, domiciliation in the State is the test. The terms "residents" and "inhabitants" when used in tax laws are, therefore, generally to be construed as referring to persons domiciled in the State.

[24] 173 U. S. 193; 19 Sup. Ct. Rep. 379; 43 L. ed. 665.

[25] 196 U. S. 466; 25 Sup. Ct. 297; 49 L. ed. 556.

corporations, which corporations were to have a lien upon the stock and a right of personal action against the non-resident stockholders to recover from them the amounts so paid. This law had, however, been construed by the Maryland courts, and this construction was accepted by the United States Supreme Court, to be, in reality, not a tax upon the stock as property, but a reasonable regulation upon the right to acquire the stock of the corporations which the State had created.[26]

§ 532. Incorporeal Hereditaments, Franchises, Etc.

All incorporeal hereditaments, such, for example, as corporate franchises, may be taxed only in the State from whose law they are derived and where, consequently, they have their legal *situs*.[27]

[26] After referring to earlier decisions relating to the taxation of stock of national banks, the court say: "In substance the contention is that the conceded principle has no application to taxation by a State of shares of stock in a corporation created by it, because, by the Constitution of the United States, the States are limited as to taxation to persons and things within their jurisdiction, and may not, therefore, impose upon a nonresident, by reason of his property within the State, a personal obligation to pay a tax. By the operation, therefore, of the Constitution of the United States, it is argued the States are restrained from affixing, as a condition to the ownership of stock in their domestic corporations by nonresidents, a personal liability for taxes upon such stock, since the right of the nonresident to own property in the respective States is protected by the Constitution of the United States, and may not be impaired by subjecting such ownership to a personal liability for taxation. But the contention takes for granted the very issue involved. The principle upheld by the rulings of this court to which we have referred, concerning the taxation by the States of stock in national banks, is that the sovereignty which creates a corporation has the incidental right to impose reasonable regulations concerning the ownership of stock therein, and that a regulation establishing the situs of stock for the purpose of taxation, and compelling the corporation to pay the tax on behalf of the shareholder, is not unreasonable regulation. Applying this principle, it follows that a regulation of that character, prescribed by a State, in creating a corporation, is not an exercise of the taxing power of the State over persons and things not subject to its jurisdiction. And we think, moreover, that the authority so possessed by the State carries with it the power to endow the corporation with a right of recovery against the stockholder for the tax which it may have paid on his behalf. Certainly, the exercise of such a power is no broader than the well-recognized right of a State to affix to the holding of stock in a domestic corporation a liability on a nonresident as well as a resident stockholder *in personam*, in favor of the ordinary creditors of the corporation."

[27] As to federal taxation of state granted franchises, see Section 57.

This doctrine is clearly stated in Louisville & Jeffersonville Ferry Co. v. Kentucky.[28] In this case it was held that a Kentucky corporation operating a ferry across the Ohio river was deprived of its property without due process of law by the action of the State in including, for purposes of taxation, in the valuation of its franchise derived from Kentucky, the value of a franchise derived from Indiana for a ferry from the Indiana to the Kentucky shore. The court say: "Beyond all question, the ferry franchise derived from Indiana is an incorporeal hereditament derived from and having its legal *situs* in that State. It is not within the jurisdiction of Kentucky. The taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by that State of the property of the ferry company without due process of law . . . as much so as if the State taxed the real estate owned by that company in Indiana."

The court go on to say that they are not called upon to decide and that they express no opinion as to the validity of a law making it a condition of the ferry company's continuing to exercise its corporate powers that it should pay a tax for its property having a *situs* in another State. It would seem, however, that such a condition would be valid, each State having the right to make such conditions as it may see fit to the existence of a company as a domestic corporation, or to entrance a foreign corporation to do business within the State. Thus, as will later appear, while a State may not tax the franchise of a foreign corporation as such, it may levy a license tax upon its right to do business within the State and may determine the amount of that tax by the value of its property, including the value of its corporate franchise. What would seem, however, to be a recent departure from this principle is discussed in Section 74 of this treatise.

§ 533. Taxation of Tangible Personal Property.

The right of the State to tax all real property situated within its borders,[29] has never been questioned. Its inability to tax real

[28] 188 U. S. 385; 23 Sup. Ct. Rep. 463; 47 L. ed. 513.

[29] Excepting, of course, property owned by the United States or by foreign governments.

property beyond its borders is equally uncontested. In these respects tangible personal property is grouped with real property. The legal principle *mobilia sequuntur personam* operates to permit the taxation of intangible personal property by a State in which its owner is domiciled even though the instruments evidencing its existence and ownership be in another State; and, conversely, it permits the State where these instruments are situated to tax them although their owner be domiciled in another State.

That tangible personal property may be taxed by the State within which it is situated has not been seriously questioned.[30]

That tangible personal property situated in one State may not be taxed by another State, even though its owner be domiciled therein, is definitely stated in Union Refrigerator Transit Co. v. Kentucky,[31] decided in 1905. In this case was presented the question whether a corporation organized under the laws of Kentucky might be assessed upon its rolling stock permanently located in other States and employed there in the prosecution of its business. The court, in its opinion, say: "The argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived."

Continuing the court point out that the doctrine as to intangible personalty has no application.

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[30] See, for example, Coe v. Errol, 116 U. S. 517; 6 Sup. Ct. Rep. 475; 29 L. ed. 715; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 1091, 29 L. ed. 257, and other cases discussed in § 332 relating to the taxation by the State of articles of interstate commerce.

[31] 199 U. S. 194; 26 Sup. Ct. Rep. 36; 50 L. ed. 150.

§ 534. Taxation of Property Situated in Several Jurisdictions.

The instrumentalities through which commerce is carried on between the States and with foreign countries may be taxed by the States as property to the extent that such instrumentalities are within the several territories of the States so taxing them. Thus buildings used for freight and passenger stations and for offices, roadbeds, rails, machine shops, etc., may be taxed by the States in which they are situated, so long as the tax is a general property tax and not one laid upon them specially, nor at a special rate because of their employment in interstate commerce. In determining, however, the value of these properties, the important principle has been laid down that in estimating the value of the property within the State, of a company doing business in several States, the entire property may be treated as a unit and its value in use as such determined, and the value of the part of the property in the particular State estimated as bearing the same proportion to the whole property as the amount of the business done

held by the federal Supreme Court itself that a tax on the value of the capital stock of a corporation is a tax on the property in which that capital is invested, and in consequence that no tax can thus be levied which includes property that is otherwise exempt, the court held in the case at bar that the coal actually situated outside of Pennsylvania at the time of the assessment might not be included in the appraisement for purposes of taxation of the capital stock of the plaintiff domestic corporation. "We regard," said the court, "this tax as, in substance and in fact, though not in form, a tax specifically levied upon the property of the corporation, and part of that property is outside and beyond the jurisdiction of the State which thus assumes to tax it."

The doctrine declared in Union Refrigerator Transit Co. v. Kentucky (199 U. S. 194; 26 Sup. Ct. Rep. 36; 50 L. ed. 150) and the two prior cases upon which that case was rested,— Louisville & Jeffersonville Ferry Co. v. Kentucky (188 U. S. 385; 23 Sup. Ct. Rep. 463; 47 L. ed. 513) and D., L. & W. R. R. Co. v. Pennsylvania (198 U. S. 341; 25 Sup. Ct. Rep. 669; 49 L. ed. 1077) is a recent doctrine. Until these cases were decided the doctrine was generally held and acted upon in many of the States that all personal property, tangible as well as intangible, wherever situated, might be taxed at the domicile of the owner. In Coe v. Errol (116 U. S. 517; 6 Sup. Ct. Rep. 475; 29 L. ed. 715), decided in 1886, the court say, without qualification, "If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also."

in the State bears to the entire business done by the company, or the mileage of tracks of a railway company, or of wires, of a telegraph or telephone company, bears to the entire mileage of tracks or wires of the company taxed.

§ 535. The Unit Rule.

As to railroad, telegraph, and sleeping-car companies engaged in interstate commerce the rule thus is, as stated by the court in Adams Express Co. v. Ohio State Auditor,[33] "that their property in the several States through which their lines of business extends may be valued as a unit for the purposes of taxation, taking into consideration the uses to which it is put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained may be taxed by the particular State, without violating any federal restriction.[34] The valuation is, thus, not confined to the wires, poles, and instruments of the telegraph company; or the roadbed, ties, rails, and spikes of the railroad company; or the cars of the sleeping-car company, but includes the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular State is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole (Pittsburg, C., C. & St. L. R. Co. v. Backus, 154 U. S. 439; 14 Sup. Ct. Rep. 1114; 38 L. ed. 1031); or taking as the basis of

[33] 165 U. S. 194; 17 Sup. Ct. Rep. 305; 41 L. ed. 683.

[34] Citing Western U. Tel. Co. v. Mass., 125 U. S. 530; 8 Sup. Ct. Rep. 961; 31 L. ed. 790; Mass. v. Western U. Tel. Co., 141 U. S. 40; 11 Sup. Ct. Rep. 889; 35 L. ed. 628; Maine v. Grand Trunk R. Co., 142 U. S. 217; 12 Sup. Ct. Rep. 121; 35 L. ed. 994; Pittsburg, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421; 14 Sup. Ct. Rep. 1114; 38 L. ed. 1031; Cleveland, C. C. & St. P. R. Co. v. Backus, 154 U. S. 439; 14 Sup. Ct. Rep. 1122; 38 L. ed. 1041; Western U. Tel. Co. v. Taggart, 163 U. S. 1; 16 Sup. Ct. Rep. 1054; 41 L. ed. 49; Pullman Palace Car Co. v. Penn., 141 U. S. 18; 11 Sup. Ct. Rep. 876; 35 L. ed. 613.

assessment such proportion of the capital stock of a sleeping-car company as the number of miles of railroad over which its cars are run in a particular State bears to the whole number of miles transversed by them in that and other States (Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; 11 Sup. Ct. Rep. 876; 35 L. ed. 613); or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a State bears to the length of its lines everywhere, deducting a sum equal to the value of the real estate and machinery subject to local taxation within the State (Western U. Tel. Co. v. Taggart, 163 U. S. 1; 16 Sup. Ct. Rep. 1054; 41 L. ed. 49)." [35]

§ 536. Adams Express Co. v. Ohio.

This "unit in use" principle of valuation received an extensive application in the case of Adams Express Co. v. Ohio State Auditor,[36] decided in 1897, for there the actual tangible property within the State was inconsiderable, whereas the value of the entire concern measured by the amount of business done was very great. Furthermore, there was there lacking that physical unity of plant which is found in railroad and telegraph companies. The court, however, said:

"Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter: but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use.

"The cars of the Pullman company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to the valuation which was sustained in that case. The cars were moved by railway carriers under contract, and the taxation of the corporation in Pennsylvania was sustained on the theory that the whole property of the company might be regarded as a unit plant, with a unit value, a proportionate part of which

[35] In the earlier part of this quotation the tense has been changed.

[36] 165 U. S. 194; 17 Sup. Ct. Rep. 305; 41 L. ed. 683.

value might be reached by the state authorities on the basis indicated.

"No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons, and furniture, than that of railroad, telegraph, and sleeping-car companies, to roadbed, rails, and ties, poles and wires, or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches, and furniture, the contracts for transportation facilities, the capital necessary to carry on the business — whether represented in tangible or in intangible property — in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others.

"We repeat that while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case — resulting from the very nature of the business."

A strong dissenting opinion, concurred in by four justices, was rendered in this case. In a petition for a rehearing of the case,[37] Mr. James C. Carter, of counsel for the express company, declared: "The step now taken by the present decision is to evolve a new general proposition, not declared or distinctly discussed in any of the prior cases, that where there is what is called a unity of use between several pieces of property not united together by any physical tie, some of the pieces situated within and some without the State, the value of the parts within may be determined by the value of the whole, even though the part within be physically separable, and is, as separated, an ordinary thing, having an ordinary market value based upon its capability of similar uses in a multitude of different businesses, differing in nothing, so far as the ascertainment of value is concerned, from the thousand other classes of chattels which form the usual subjects of taxation."

[37] Adams Express Co. v. Ohio State Auditor, 166 U. S. 185; 17 Sup. Ct. Rep. 604; 41 L. ed. 965.

In the opinion refusing the rehearing prayed for, Justice Brewer said: "The Adams Express has, according to its showing, in round numbers $4,000,000 of *tangible property* scattered through the different States, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of *tangible* property by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000. . . . Where is the *situs* of this *intangible* property? Is it simply where its home office is, . . . or in the State which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. Every State within which it is transacting business and has its property, more or less, may rightfully say that the $16,000,000 of value which it possesses springs not merely from the original grant and corporate property by the State which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises, and privileges into a single *unit* of property, and this State contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. . . . In conclusion let me say that this is eminently a practical age; that we must recognize things as they are and as possessing a nature which is accorded to them in the markets of the world, and that no fine-spun theories about *situs* should interfere to enable these large corporations whose business is carried on through many States to escape from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States requires." [38]

[38] "As incident to this unit rule of valuation with mileage apportionment, the corporation has the right to show by all proper evidence that the application of the mileage rule of apportionment to such valuation is for any reason imperfect and unjust. Thus it may show that it holds property included in such valuation, as an entirety which is exempt from taxation. It

§ 537. Taxation of Capital Stock of Companies Operating in Two or More States.

In taxing the property within the State of a company operating in two or more States the not unusual practice has been to levy the tax on the capital stock of the company, taking as the basis of assessment such proportion of its capital stock as the amount of its business within the State bears to the entire business done; and in railroads, telegraph and telephone companies, determining this proportion by the proportion of the total mileage of track or wires lying within the State. This, for example, was the method employed in the leading case of Pullman's Palace Car Co. v. Pennsylvania,[39] decided in 1891. This also was the method employed in Delaware, L. & W. R. Co. v. Pennsylvania,[40] in which it will be remembered it was held that in appraising the capital stock, tangible property located in other States might not be included.

§ 538. Taxation of Movables.

In a series of cases the Supreme Court has held that in taxing the rolling stock of railway, sleeping-car and refrigerator companies, a State may estimate the number of cars upon the average kept and used within the State, and for the determination of this average may use any reasonable rule, the one ordinarily employed being that of mileage.[41] Conversely that part of the property of a corporation which upon an average is kept and employed outside of the State may not be taxed.[42]

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may also show that its property in other States is of disproportionate value, as, for instance, that it is located in a more densely settled community, where it is disproportionately more productive, or consists of terminals in large cities or other States. All such facts are relevant as bearing upon the value of the State's portion of the entire property. A state statute or a procedure by a State under a statute which denied the company the opportunity of proving such facts, would doubtless be held invalid." Judson, *Taxation*, § 261.

[39] 141 U. S. 18; 11 Sup. Ct. Rep. 876; 35 L. ed. 613.

[40] 198 U. S. 341; 25 Sup. Ct. Rep. 669; 49 L. ed. 1077.

[41] Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; 11 Sup. Ct. Rep.

[42] Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194; 26 Sup. Ct. Rep. 36; 50 L. ed. 150; New York v. N. Y. C. & H. R. R. Co., 202 U. S. 584; 26 Sup. Ct. Rep. 714; 50 L. ed. 1155.

§ 539. Taxation of Intangible Personal Property.

Whereas, with reference to the taxation of tangible personal property, the practice has been to determine its *situs* by its actual location, with respect to intangible personalty, the principle of *mobilia sequuntur personam* has generally, though as we shall presently see, not always been applied.

In Union Refrigerator Transit Co. v. Kentucky[43] the court say: "There is an obvious distinction between tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its *situs* except, perhaps, in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicile, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam,* and to hold that the property may be taxed at the domicile of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained. Such have been the repeated rulings of this court."

§ 540. Doctrine of State Tax on Foreign-Held Bonds Case.

However, in the case of State Tax on Foreign-Held Bonds,[44] decided in 1873, was laid down a rule which, if strictly adhered to, would have greatly embarrassed the States in their attempts to tax intangible personal property. In this case it was declared that bonds and other evidences of indebtedness are property in the hands of the holders, and, when held by non-residents of the State in which issued, are property beyond the jurisdiction of, and therefore not taxable by, that State. The law contested in this case had required that a railroad company should, before the payment of the interest on certain of its bonds, retain out therefrom the amount of the tax and pay it over to the State. By this direction, it was held, the law operated to impair the obligation

[43] 199 U. S. 194; 26 Sup. Ct. Rep. 714; 50 L. ed. 1155.

[44] 15 Wall. 300; 21 L. ed. 179.

of the contract between the company and its non-resident bondholders. And the court held that it was such an impairment because it was not a proper exercise of the taxing power, the court saying: "The bonds issued by the Railway Company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State. The law which requires the treasurer of the company to retain five per cent. of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and under pretense of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the State. It is a law which thus impairs the obligation of the contract between the parties."

The reasoning by which the court reached the doctrine that the bond in the hands of non-resident bondholders was property without the jurisdiction of the State is given in the note below.[45]

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[45] "Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors, is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations in numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement. The property mortgaged belonged entirely to the Company, and so far as it was situated in Pennsylvania was taxable there. If taxation is the correlative of protection, the taxes which it there paid were the correlative for the protection which it there received. And neither the taxation of the property, nor its protection, was augmented or diminished by the fact that the Corporation was in debt or free from debt. The property in no sense belonged to the non-resident bondholder or to the mortgagee of the Company. The mortgage transferred no title; it created only a lien upon the property. Though in form a conveyance, it was both at law and in equity a mere security for the debt.

"Such being the character of a mortgage in Pennsylvania, it cannot be said,

The principles thus broadly laid down in the State Tax on Foreign-Held Bonds had soon to be modified, and, in fact, the case has since been held down to the precise point decided. That public securities, consisting of state bonds and bonds of municipal corporations and circulating notes of banking institutions are exempted from the principle *mobilia sequuntur personam,* is stated in the case itself. But in later cases the same exemption is applied to shares of stock, mortgages, and, to a certain extent, to promissory notes and other credits. This will appear in the sections which follow.

§ 541. Taxation of Shares of Stock.

Shares of stock in incorporated companies may be viewed either as property in the hands of their holders or as representing the property of the company. Thus they are viewed in the latter light when their value is taken as measuring the value of the property of the company for the purposes of a property tax upon that company. In such cases, as we have seen, tangible property of the company permanently located outside of the State may not be

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as was justly observed by counsel, that the non-resident holder and owner of a bond secured by a mortgage in that State owns any real estate there. A mortgage being there a mere chose in action, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce, by its sale, the payment of his demand. This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein, but when held by a non-resident it is as much beyond the jurisdiction of the State as the person of the owner.

"It is undoubtedly true that the actual *situs* of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the State in which it may be taxed. The same thing is true of public securities consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of and are treated as property, in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidence of debt, are not separated from the possession of the owners."

included in the appraisement. The States may also levy a license tax upon a domestic corporation, that is, upon its right not simply to be, but to do business within the State, and this license tax it may measure by the value of the capital stock. Also a State may levy a similar tax upon a foreign corporation, unless engaged in interstate commerce, the payment of which is made a condition precedent to its right to enter the State and to do business therein, and measure this tax by the nominal or market value of the capital stock of the company. In both of these cases the tax is not, in reality, upon the capital stock, but is measured by it.[46] The present section will be concerned with the taxation of corporate stock as intangible personal property in the hands of its holders or owners.

The declaration of the court in the State Tax on Foreign-Held Bonds would, if strictly pursued, have prevented the levying of such a tax upon non-resident holders of the stock of domestic corporations, upon the principle of *mobilia sequuntur personam.* In Tappan v. Merchants' National Bank,[47] however, the court held that, as to shares of stock at least, this principle does not reasonably apply, and that, for purposes of taxation, these shares may be separated from the person of their owner and given a *situs* where the corporation has its *situs,* namely, at the place of its incorporation. The court in that case say:

"The question is then presented whether the General Assembly, having complete jurisdiction over the person and the property, could separate a bank share from the person of the owner for the purposes of taxation. It has never been doubted that it was a proper exercise of legislative power and discretion to separate the interest of a partner in partnership property from his person for that purpose, and to cause him to be taxed on its account at the place where the business of the partnership was carried on. And this, too, without reference to the character of the business or the property. The partnership may have been formed for the purpose

[46] But see 74, and especially W. U. Tel. Co. v. Kansas, 216 U. S. 1; 30 Sup. Ct. Rep. 190, and The Pullman Co. v. Kansas, 216 U. S. 56; 30 Sup. Ct. Rep. 232.

[47] 19 Wall. 490; 22 L. ed. 189.

of carrying on mercantile, banking, brokerage or stock business. The property may be tangible or intangible, goods on the shelf or debts due for goods sold. The interest of the partner in all the property is made taxable at the place where the business is located.

"A share of bank stock may be in itself intangible, but it represents that which is tangible. It represents money or property invested in the capital stock of the bank. That capital is employed in business by the bank, and the business is very likely carried on at a place other than the residence of some of the shareholders. The shareholder is protected in his person by the government at the place where he resides; but his property in this stock is protected at the place where the bank transacts the business. If he were a partner in a private bank doing business at the same place, he might be taxed there on account of his interest in the partnership. It is not easy to see why, upon the same principle, he may not be taxed there on account of his stock in an incorporated bank. His business is there as much in the one case as in the other. He requires for it the protection of the government there, and it seems reasonable that he should be compelled to contribute there to the expenses of maintaining that government. It certainly cannot be an abuse of legislative discretion to require him to do so. If it is not, the General Assembly can rightfully locate his shares there for the purposes of taxation." [48]

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[48] In criticism of this argument, Professor J. H. Beale, Jr., in the *Harvard Law Review* (XVII, 254), says: "But it is submitted that the supposed distinction between bonds and stocks in this respect does not exist. It is true, as has been seen, that the owner is taxable upon the capital and proceeds of a business where that business is carried on, and that a partner in a firm is therefore taxable on the value of a firm business where the firm acts; and that in many ways the shareholder in a private corporation is like a partner. But the very difference in their legal position should lead to a difference in taxation. The partner is taxed on the business of the firm because he is the legal representative of the business; there is no one else to tax. The tax paid by the partners is the tax and the only tax on the firm. But the corporation, being a legal entity, is itself, as has been seen, taxed upon the business done; to tax the stockholders also upon it is to tax the very same thing twice. The legal interest of the partner in the business is that of the owner; the legal interest of the stockholder is not that of the owner but of the creditor; to him is due from the corporation

The doctrine declared in Tappan v. National Bank, though difficult to harmonize with prior decisions, is declared in Corry v. Baltimore[50] to be conclusively established.[51]

§ 542. Taxation of Mortgages.

In Savings and Loan Society v. Multnomah[52] the broad dicta of the court in the State Tax on Foreign-Held Bonds cases were again modified, this time with reference to the taxation of mortgages. In this case the court held that mortgages, whether held by residents or non-residents, may be taxed at their full value by the State in which the mortgaged property is located, and that this may be done either by taxing the whole value of the property to the mortgagor or by taxing to the mortgagee the interest represented by the mortgage and the remainder to the mortgagor. The court say:

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a share of the net profits. His claim is a personal one against the corporation; like the bondholder he has only a chose in action, and no direct legal interest in the business."

[50] 196 U. S. 466; 25 Sup. Ct. Rep. 297; 49 L. ed. 556.

[51] "That it was rightly determined that it was within the power of the state to fix, for the purposes of taxation, the *situs* of stock in a domestic corporation, whether held by residents or non-residents, is so conclusively settled by the prior adjudications of this court that the subject is not open for discussion. Indeed, it was conceded in the argument at bar that no question was made on this subject. The whole contention is that, albeit the *situs* of the stock was in the State of Maryland for the purposes of taxation, it was nevertheless beyond the power of the State to personally tax the non-resident owner for and on account of the ownership of the stock, and to compel the corporation to pay, and confer upon it the right to proceed by a personal action against the stockholder in case the corporation did pay. Reiterated in various forms of expression, the argument is this: that as the *situs* of the stock within the state was the sole source of the jurisdiction of the State to tax, the taxation must be confined to an assessment *in rem* against the stock, with a remedy for enforcement confined to the sale of the thing taxed, and hence without the right to compel the corporation to pay, or to give it when it did pay, a personal action against the owner.

"But these contentions are also in effect long since foreclosed by decisions of this court." First National Bank v. Kentucky, 9 Wall. 353; 19 L. ed. 701; Tappan v. Merchants' National Bank, 19 Wall. 490; 22 L. ed. 189."

[52] 169 U. S. 421; 18 Sup. Ct. Rep. 392; 42 L. ed. 803.

"The declaration of the court in the State Tax on Foreign-Held Bonds (15 Wall. 300; 21 L. ed. 179) that a mortgage, being a mere security for the debt, confers no interest in the land, and, where held by a non-resident, is as much beyond the jurisdiction of the State as the person of its owner, 'went beyond what was required for the decision of the case and cannot be reconciled with other decisions of this court.'" Concluding, the court say: " . . . The statute of Oregon, the constitutionality of which is now drawn in question, expressly forbids any taxation of the promissory note, or other instrument of writing, which is the evidence of the debt secured by the mortgage; and, with equal distinctness, provides for the taxation, as real estate, of the mortgage interest in the land. Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest and by way of security for the debt, it appears to us to be clear upon principle, and in accordance with the weight of authority, that this interest, like any other interest, legal or equitable, may be taxed to its owner (whether resident or non-resident) in the state where the land is situated, without contravening any provision of the Constitution of the United States."

§ 543. Taxation of Credits.

In the preceding paragraphs we have seen that mortgages and shares of stock have been taken out of the broad doctrine declared in the State Tax on Foreign-Held Bonds cases, and placed under the rule of *mobilia sequuntur personam.* To a very considerable extent the same rule has been applied to promissory notes and similar evidences of indebtedness. The rule has, however, not been followed when the notes have been placed in the hands of an agent for receipt of the interest or for the collection of the capital sums. In such cases the *situs* of the notes has in some cases been held to be that of the agent; in others, where there has been apparent a scheme to avoid the payment of taxes, the *situs* has been held to be at the domicile of their owner. A statement of some of the leading cases will illustrate these doctrines.

pay the local debts before turning over the residue to be distributed, or distributing it themselves, according to the rules of the domicile. The title of the principal administrator, or of a foreign assignee in bankruptcy — another type of universal succession — is admitted in but a limited way or not at all. . . . To come closer to the point, no one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the *situs* accepts its rules of succession from the law of the domicile, or that by the law of the domicile the chattel is part of a *universitas* and is taken into account again in the succession there."

Distinguishing the doctrine of this case from that in State Tax on Foreign-Held Bonds the court say: "The taxation in that case was on the interest on bonds held out of the State. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. (Bacon v. Hooker, 177 Mass. 333.) Therefore, considering only the place of the property it was held that bonds held out of the State could not be reached. The decision has been cut down to its precise point by later cases."

In State Board of Assessors v. Comptoir National D'Escompte,[60] decided in 1903, it was held that a State is not forbidden by the federal Constitution to tax credits based upon loans on collateral security made by the local agent of a foreign corporation, the collateral being retained by the agent, and the credits being either in the form of credits on Paris or London, or simply of overdrafts, upon which the customer was charged interest.

In Buck v. Beach,[61] however, the court found itself obliged to deny the power of the State of Indiana to tax certain notes which were in the hands of an agent within the State, and which, it appeared, had been placed, together with the mortgages securing their payment, in his hands to escape their taxation in Ohio, but with nothing else to connect them with the State and give them a

[60] 191 U. S. 388; 24 Sup. Ct. Rep. 109; 48 L. ed. 232.

[61] 206 U. S. 392; 27 Sup. Ct. Rep. 712; 51 L. ed. 1106.

situs there. These notes were given and payable in Ohio by residents of that State, to a resident of New York, for loans made in Ohio on lands there situated. In other words, it was held that notes evidencing debts may not, for taxing purposes, be given a *situs* merely by their actual presence in the State. There must be, in addition, some facts which, aside from the mere fact of their being protected by the police power, will bring them under the operation and protection of the local law. The fact of an attempt to escape proper taxation in Ohio, it was declared, did not confer jurisdiction upon Indiana to tax property not really within its borders.[62]

§ 544. Taxation of Franchises.

The State which incorporates, and that State only, may tax the franchise of a corporation, that is, its right to be and operate as a corporation. In Louisville & Jeffersonville Ferry Co. v. Kentucky[63] the court say, with reference to the attempt of Kentucky to include for purposes of taxation the valuation of a ferry franchise granted to Indiana: "Beyond all question, the ferry franchise derived from Indiana is an incorporeal hereditament derived from and having its legal *situs* in that State. It is not within the jurisdiction of Kentucky. The taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by that State of the property of the ferry company without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States; as much as if the State taxed the real estate owned by that company in Indiana."

It would seem, however, that the franchise or permission granted a foreign corporation to do business in a State may be taxed as property in that State. Also, of course, a yearly pay-

[62] In a dissenting opinion, concurred in by Justice Brewer, Justice Day declared: "In view of the recognition of the character of bills and notes as tangible property, it seems to me inaccurate to say that they are mere evidences of debt. They are tangible things, capable of delivery, passing from hand to hand, and for many purposes may be regarded as of the value of the debt which they evidence."

[63] 188 U. S. 385; 23 Sup. Ct. Rep. 463; 47 L. ed. 513.

ment by the companies may be required by that State as a condition precedent to doing business in that State, but such payments partake more of the nature of a license fee than of a tax.

As regards a domestic corporation, a State may tax not only its property, and its franchise (valuing that franchise by net or gross receipts) but also may tax, as property, privileges or rights which it may have granted, as, for example, the use of the public streets. The fact that, at the time of the granting of this right or privilege, payment was made therefor by the company, either in the form of a lump sum or a continuing annual amount, does not exempt that right from taxation according to its pecuniary value, any more than does the purchase of a piece of land from the State and payment therefor exempt it from future taxation as property.[64]

§ 545. Taxation of Good-Will

That a franchise may be taxed as a piece of property, and that, in estimating the value of this property, the value of the good-will of the company may be included, is clearly established in Adams Express Co. v. Ohio.[65]

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[64] People v. Roberts, 154 N. Y. 101; 159 N. Y. 70.

[65] 166 U. S. 185; 17 Sup. Ct. Rep. 604; 41 L. ed. 965.

"In the complex civilization of to-day a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the federal Constitution which restrains a State from taxing at its real value such intangible property. . . . It matters not in what this intangible property consists,—whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country."

In State Railroad Tax Cases (92 U. S. 575, 603; 23 L. ed. 663, 669), is this language by Mr. Justice Miller, speaking for the court:

"That the franchise, capital stock, business, and profits of all corporations are liable to taxation in the place where they do business, and by the State which creates them, admits of no dispute at this day. 'Nothing can be more certain in legal decisions,' says this court in Society for Savings v. Coite (6 Wall. 607; 18 L. ed. 903), 'than that the privileges and franchises of a private

In New York *ex rel.* Metropolitan Street Railway Co. v. Tax Commissioners[66] it was held that a tax levied specially upon the franchise of the company as a piece of property of value was not a double tax, because a lump sum had been paid at the time the franchise was granted, and an annual payment of a fixed amount or fixed percentage of earnings, such payments not having been specifically declared to be in lieu of taxes. The fact that for many years the State had not attempted to levy such a special franchise tax was held not to be an estoppel upon the State.

§ 546. Tax Exemptions and the Obligation of Contracts.

This subject has been considered in the preceding chapter.

§ 547. Double Taxation.

We have seen that the right of a State to tax depends upon its jurisdiction over the object taxed, and that this jurisdiction is obtained by either actual or constructive presence of the object within the State's territorial limits. This constructive presence applies to personal property and depends upon the principle *mobilia sequuntur personam.* As to personal property it is thus possible that it may actually be in one State and be there taxed, and constructively in another State and there also taxed. The fact that one State has exercised its jurisdiction with reference to a matter, whether of taxation or otherwise, clearly can impose no obligation upon another State not to exercise such jurisdiction as it may have. This the Supreme Court of the United States has repeatedly recognized. In Coe v. Errol[67] the court say: "If the owner of personal property resides within a State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least

corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of a state government.' State Freight Tax Case (Philadelphia & R. R. Co. v. Pennsylvania), 15 Wall. 232; 21 L. ed. 146; State Tax on Gross Receipts (Philadelphia & R. R. Co. v. Pennsylvania), 15 Wall. 284; 21 L. ed. 164."

[66] 199 U. S. 1; 25 Sup. Ct. Rep. 705; 50 L. ed. 65.

[67] 116 U. S. 517; 6 Sup. Ct. Rep. 475; 29 L. ed. 715.

affect the right of the State in which the property is situated to tax it also." And in Blackstone v. Miller[68] the court say: "No doubt this power on the part of two States to tax on different and more or less inconsistent principles leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law." [69]

The double taxation of a piece of property by the same State is, however, forbidden not only by the several constitutions of most of the States, but by the Fourteenth Amendment.

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[68] 188 U. S. 189; 23 Sup. Ct. Rep. 277; 47 L. ed. 439.

[69] Citing Coe v. Errol, 116 U. S. 517; 6 Sup. Ct. Rep. 475; 29 L. ed. 715; Knowlton v. Moore, 178 U. S. 41; 20 Sup. Ct. Rep. 747; 44 L. ed. 969. See also Kidd v. Alabama, 188 U. S. 730; 23 Sup. Ct. Rep. 401; 47 L. ed. 669.

CHAPTER L.

THE FEDERAL JUDICIARY.

Its Organization.

§ 548. Constitutional Provisions.

The Constitution provides that there shall be a Supreme Court of the United States, and such inferior courts as Congress may from time to time ordain and establish. It is also provided that "the judges both of the supreme and inferior courts shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office;" [1] and that the judges of the Supreme Court shall be nominated by the President and appointed by and with the advice and consent of the Senate.[2] All the other federal justices are similarly appointed, but it is within the power of Congress to vest their appointment "in the President alone, in the courts of law, or in the heads of departments." [2]

With the exception then of the tenure of office,[3] and the constitutional provision regarding appointment of the justices of the Supreme Court, the form of organization, the number of justices, etc., the federal courts, including the Supreme Court, are wholly within the control of Congress.

The practice and procedure to be followed in these courts is also within the control of Congress except as to certain mandatory provisions with reference to jury trial, second jeopardy, speedy and public trial, etc., contained principally in the first eight

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[1] Art. III, Sec. I.

[2] Art. II, Sec. II, Cl. 2.

[3] The exception does not apply to the territorial courts or the Courts of Private Land Claims, and such *quasi*-judicial bodies as the Interstate Commerce Commission as these are not considered, properly speaking, as parts of the federal judiciary but rather as agents of Congress. Clinton v. Englebrecht, 13 Wall. 434; 20 L. ed. 659. See section 161. The Court of Claims, however, and the courts of the District of Columbia are federal and not congressional courts.

Amendments to the Constitution. These constitutional rights, immunities, and privileges guaranteed to the individual are considered elsewhere.

§ 549. Inferior Federal Courts.

By the original Judiciary Act of 1789 provision was made for inferior federal courts to be known as District and Circuit Courts. The territory of the Union was divided into districts composed of a State or portions of a State, for each of which a district and a Circuit Court was provided; and these districts were grouped into circuits to each of which a Justice of the Supreme Court was assigned as Circuit Judge. With the exception of minor changes, as for example, the creation of new districts and circuits and making provision for Circuit Judges in addition to the Justices of the Supreme Court, the system thus established remained undisturbed for over one hundred years. In 1891, Congress created a new class of federal tribunals known as the Circuit Courts of Appeals, one of these being assigned to each of the existing nine circuits.

As at present constituted, therefore, the federal judicial machinery consists of a Supreme Court, Circuit Courts of Appeal, Circuit Courts, and District Courts. In addition there are a Court of Claims, and the Judiciary of the District of Columbia.

§ 550. The Supreme Court: Its Organization.

The Supreme Court is at present composed of nine justices — eight associate justices and one chief justice. It sits at Washington, D. C., and holds annual terms beginning in October and lasting till the end of May.[4]

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[4] From 1789 to 1807 there were six Supreme Court Justices; from 1807 to 1837 seven; from 1837 to 1863 nine; from 1863 to 1866 ten; from 1866 to 1869 seven; since 1869 nine, the present number. For many years two terms annually were held. A chief justice is only impliedly provided for in the Constitution in that clause which declares that the chief justice of the United States shall preside in cases of impeachment of the President (Art. I, Sec. III, Cl. 6). According to Art. I, Sec. VI, Cl. 2, no member of either house of Congress may, at the same time be a federal judge, but no constitutional

Each justice of the Supreme Court is assigned to a circuit in which it is required by law that he shall hold court in each district at least once in two years. His services may also be required in the Circuit Court of Appeal of his circuit. In fact, however, since the erection of the Circuit Courts of Appeal the Supreme Court justices sit but seldom in the inferior courts.

§ 551. Circuit Courts of Appeal: Organization.

The Circuit Courts of Appeal created by the act of 1891 are each held by three justices. These may be the Supreme Court justice of the circuit, the circuit judges, or one or more of the district judges. Two judges constitute a quorum.

§ 552. Circuit Courts: Organization.

There are nine judicial circuits, each circuit being subdivided into districts. In some cases two circuit judges, and in other cases three or more, being appointed for each circuit. One justice of the Supreme Court is assigned to each circuit, and as thus assigned is termed circuit justice.

Circuit Courts may be held by the circuit justice, or by a circuit judge of the circuit, or by the district judge of the district, each sitting alone, or by any two of these judges sitting together.[5]

§ 533. District Courts: Organization.

There are now about eighty District Courts, nine of which are in the territories. In a few instances two districts are assigned to one judge. For each district a United States district attorney is appointed to represent the interests of the Federal Government. Marshals and other court officers are also provided. District judges must reside within their respective districts. They may, when assigned by the circuit judge or justice or the Chief Justice of the Supreme Court, hold the District or Circuit Court for any

disability to hold any federal office rests upon the judge. Thus Jay while Chief Justice was for a time Secretary of State, and also minister to England; Ellsworth while associate justice was minister to France; and Marshall while Chief Justice was for a time Secretary of State.

[5] Rev. Stat., § 609.

other district of the circuit within which their districts lie,[6] and any one of them may upon the designation of the Chief Justice hold the District and Circuit Court of any District in a Circuit contiguous to his own.

§ 554. Court of Claims: Organization.

This tribunal was established in 1855, and is at present composed of five justices. It sits at Washington, D. C., holding one term yearly, beginning the first Monday in December.

§ 555. Judiciary of the District of Columbia.

The courts of the District of Columbia consist of Police Courts, a Supreme Court, and a Court of Appeals. The Supreme Court consists of a chief justice and five associate justices, each of whom individually holds court for the trial of law, equity, and criminal cases. Thence an appeal lies to the Court of Appeals composed of a chief justice and two associate justices. From the Court of Appeals in certain cases an appeal or writ of error lies to the Supreme Court of the United States.

§ 556. The Supreme Court: Original Jurisdiction.

The jurisdiction of the Supreme Court is of two kinds — original and appellate. The appellate jurisdiction is, in turn, of two kinds; that coming by way of writ of error to the courts of the States, and that by appeal from the inferior federal tribunals. The original jurisdiction is determined by the Constitution,[6a] providing that "In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction."

It has been held that it is not competent for Congress to give to the Supreme Court original jurisdiction in other than these specifically enumerated cases. This doctrine is deduced from the constitutional provision that "in all other cases . . . the Supreme Court shall have appellate jurisdiction, both as to law

[6] Rev. Stat., § 591–4.

[6a] Art. III, Sec. II.

and fact, with such exceptions and under such regulations as the Congress shall make." [7]

§ 557. Inferior Courts May Be Granted Jurisdiction of Cases Within the Original Jurisdiction of the Supreme Court.

The implication from the foregoing, especially from the last clause, is that the Supreme Court may not take appellate jurisdiction in cases in which it might exercise original jurisdiction, and, therefore, that it would not be within the power of Congress to give to the inferior federal courts original jurisdiction over causes cognizable in the first instance by the Supreme Court. The point has never been squarely passed upon by the Supreme Court, but Congress has in fact, in a number of instances, granted such original jurisdiction to inferior federal courts, and there are a number of judicial *dicta* in support of the constitutionality of the practice.[8] Indeed, by the original Judiciary Act of 1789, the Circuit and District Courts were given judisdiction in certain causes falling within the original jurisdiction of the Supreme Court as defined in the Constitution, and this congressional interpretation, practically contemporaneous with the adoption of the

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[7] Art. III, Sec. II, Cl. 3.

In Marbury v. Madison (1 Cr. 137; 2 L. ed. 60), in answer to the contention that the grant of jurisdiction to federal courts being a general one and containing no restrictive or negative words, Congress might, within its discretion, extend or restrict the grant of original jurisdiction to the Supreme Court, Chief Justice Marshall said: "If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. . . . When an instrument organizing fundamentally a judicial system divides it into one supreme, and so many inferior courts as the legislature may ordain and establish, then enumerates its powers, and proceeds so far to distribute them as to define the jurisdiction of the Supreme Court by declaring the cases in which it shall take original jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original and not appellate, in the other it is appellate and not original."

[8] *Cf.* Garland & Ralston, *Constitution and Jurisdiction of the United States Courts*, § 7.

Constitution, has never been repudiated, and the provisions in question were incorporated into the Revised Statutes.[9] This interpretation, furthermore, has been judicially defended by Justice Nelson in Graham v. Stucken,[10] by Chief Justice Waite in Ames v. Kansas[11] and Justice Field in United States v. Louisiana.[12] In the Ames case the Chief Justice, after reviewing the long-continued construction of Congress and prior judicial *dicta,* says: "In view of the practical construction put on this provision of the Constitution by Congress at the very moment of the organization of the government, and of the very significant fact that from 1789 until now no court of the United States has ever in its actual adjudications determined to the contrary, we are unable to say that it is not within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction." And in the latter cases, Justice Field says: "In Ames v. Kansas the question was very fully examined and the conclusion reached that the original jurisdiction of the Supreme Court in cases where a State is a party is not made exclusive by the Constitution, and that it is competent for Congress to authorize suits by a State to be brought in the inferior courts of the United States."

The case of Ames v. Kansas is practically conclusive of the question, though technically it cannot be said to be an exact precedent, for the case was not one brought originally in a lower federal court, but first instituted in a state court, and thence removed to the federal Circuit Court.

§ 558. Supreme Court: Appellate Jurisdiction.

The appellate jurisdiction of the Supreme Court, together with the entire jurisdiction of all the inferior federal courts is wholly[13]

[9] §§ 629, 687.

[10] 4 Blatchf. 50.

[11] 111 U. S. 449; 4 Sup. Ct. Rep. 437; 28 L. ed. 482.

[12] 123 U. S. 32; 8 Sup. Ct. Rep. 17; 31 L. ed. 69.

[13] Except that facts passed upon by a jury may not be reviewed by the Supreme Court, except so far as the rules of the common law permit.

within the control of Congress under the constitutional provision that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," and that "in all other than original cases . . . the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

These exceptions and regulations which Congress is thus authorized to make have reference to the granting and regulation of appeals to the Supreme Court. Congress thus may prevent the exercise of appellate jurisdiction by the Supreme Court by making no provision for appeals or writs of error from the lower federal or from the state courts, either by failing to grant original jurisdiction to the inferior courts, or by providing that their jurisdiction, when granted, shall be final.

That the appellate jurisdiction of the Supreme Court is within the control of Congress was strikingly manifested in the case of *Ex parte* McCardle.[14] In this case the Supreme Court had assumed jurisdiction by appeal from a Circuit Court, the case argued, and taken under advisement, but while still undecided, Congress by an act deprived the court of appellate jurisdiction over the class of cases to which the one at issue belonged. Thereupon the Supreme Court dismissed the appeal for want of jurisdiction. This congressional action, it was known, had been taken to prevent the court from passing upon the constitutionality of certain "reconstruction" measures. The court, however, said: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."

§ 559. Appeals from Circuit and District Courts.

As at present by statute provided, the Supreme Court has the following appellate jurisdiction with reference to the Circuit Courts.

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[14] 7 Wall. 506; 19 L. ed. 264.

Appeals or writs of error may be taken from the circuit courts direct to the Supreme Court in the following cases:[15]

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From final sentences and decrees in prize cases.

In cases of conviction of a capital crime.[16]

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

In addition to the foregoing enumerated in the act of March 3, 1891, appeals lie in equity suits brought by the United States, and in cases arising under statutes regulating interstate commerce.

§ 560. Appeals from Circuit Courts of Appeal.

All cases in the Circuit Courts of Appeal, not expressly made final, and in which the matter in controversy exceeds one thousand dollars besides costs, may be reviewed by the Supreme Court by appeal or writ of error. Inasmuch, however, as most of the judgments and decisions of the Circuit Courts of Appeal are declared final (namely, all cases in which jurisdiction is dependent entirely upon the citizenship of the parties, and all patent,

[15] Act of March 3, 1891. 26 Stat. at L. 826, Chap. 517. Act of Jan. 20, 1897. 29 Stat. at L. 492, Chap. 68.

[16] An "infamous" crime is one punishable by imprisonment in a state prison or penitentiary, with or without hard labor. *In re* Mills, 135 U. S. 263; 10 Sup. Ct. Rep. 762; 34 L. ed. 107. In criminal cases, in which a conviction has been had in an inferior federal court without jurisdiction the Supreme Court, though without appellate jurisdiction, will discharge on habeas corpus. Bain's Case, 121 U. S. 1; 7 Sup. Ct. Rep. 781; 30 L. ed. 849; *In re* Ayers, 123 U. S. 443; 8 Sup. Ct. Rep. 164; 31 L. ed. 216; Fitts v. McGhee, 172 U. S. 516; 19 Sup. Ct. Rep. 269; 43 L. ed. 535.

The constitutionality of this power of the Supreme Court to revise judgments and decrees of the state courts, a power first given it by Congress in the Judiciary Act of 1789, and ever since continued, has been considered in an earlier chapter of this treatise.[18]

In cases brought to the Supreme Court by writs of error from the state courts, the judgment of these courts will not be reversed, whatever construction they may have given to an alleged federal right, if it appear that there was a local law which, rightly interpreted, would sustain the judgment entered or decree given.[19]

In De Saussure v. Gaillard[20] the general rule is declared to be that to give the Supreme Court jurisdiction on a writ of error to a state court, "it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it." And in Johnson v. Risk[21] this rule is supplemented by the declaration that: "Where there is a federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then, if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because, when put to inference as to what points the state court decided, we ought not to assume that it proceeded on ground clearly untenable.[22] But where a defense is distinctly made, resting on local statutes, we should not, in order to reach a federal question, resort to critical conjecture as to the action of the court in the disposition of such defense."

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18 See Chapter VI.

19 Neilson v. Lagow, 12 How. 98; 13 L. ed. 900; Magwire v. Tyler, 8 Wall. 650; 19 L. ed. 320; Keith v. Clark, 97 U. S. 454; 24 L. ed. 1071; Klinger v. Missouri, 13 Wall. 257; 20 L. ed. 635; Johnson v. Risk, 137 U. S. 300; 11 Sup. Ct. Rep. 111; 34 L. ed. 683. *Cf.* Curtis, *Jurisdiction of Federal Courts*, p. 39.

20 127 U. S. 216; 8 Sup. Ct. Rep. 1053; 32 L. ed. 125.

21 137 U. S. 300; 11 Sup. Ct. Rep. 111; 34 L. ed. 683.

22 Citing Klinger v. Missouri, 13 Wall. 257; 20 L. ed. 635.

§ [illegible] Circuit Courts of Appeal : Jurisdiction.

The Circuit Courts of Appeal have appellate jurisdiction over all cases heard in the Circuit and District Courts, except those which are carried to the Supreme Court. The judgments and decrees thus rendered upon appeal are final except in the few instances enumerated in the preceding section.

§ 564. Circuit Courts: Jurisdiction.

The Circuit Courts since the act of 1891 creating the Circuit Courts of Appeal have had only original jurisdiction. This jurisdiction is, however, very wide, including, subject to a pecuniary limitation, most of the subjects which in Article III, Section II, Clause 1, of the Constitution are enumerated as falling within federal judicial cognizance. Thus, in general, any one can sue in a Circuit Court to enforce a right arising under the Constitution and laws of the United States when the matter in controversy is more than $2,000, exclusive of interest and costs. Any suit involving this amount may be brought in the same tribunal if between citizens of different States or citizens of a State and subjects of a foreign State, or citizens of the same State claiming land under grants from different States; and all criminal violations of federal law are there cognizable. This criminal jurisdiction, except as to capital crimes, is concurrently possessed by the District Courts.

Where the United States is plaintiff or petitioner, and where the controversy is between citizens of the same State claiming land under grants from different States, the money limit does not apply. In those cases where the limit does apply it is not necessary that two thousand dollars or more shall be recovered, but that this amount shall be claimed in good faith by the plaintiff.[23]

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[23] "§ 1. That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interests and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority,

§ 565. District Courts: Jurisdiction.

The purposes of this treatise do not require a detailed and complete statement of the jurisdiction of the lower federal courts, but speaking generally, and excepting the less important classes of cases, the jurisdiction of the District Courts, as determined by statute, is as follows:

The District Courts have no appellate jurisdiction. Their original jurisdiction extends to all crimes, not capital, falling within the federal jurisdiction;[24] all original proceedings in bankruptcy; suits at common law instituted by the United States; suits arising under the postal laws; suits to recover penalties incurred under federal laws; suits against the United States not exceeding $1,000 in amount;[25] suits under the Civil Rights Elective Franchise Acts; suit brought by an alien based

or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interests and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any circuit court or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; and the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law." Act August 13, 1888, 25 Stat. at L. 433.

[24] This jurisdiction is concurrent with that of the Circuit Courts.

[25] The Court of Claims has concurrent jurisdiction.

upon torts involving offenses against the law of nations; suits against consuls and vice-consuls; suits to enforce liens of the United States upon real estate for internal revenue taxes; and civil causes of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it, and of all seizures on land and on waters not within the admiralty and maritime jurisdiction," and of proceedings to condemn property taken as prize. This admiralty jurisdiction is exclusive.[26]

§ [illegible]. Court of Claims: Jurisdiction.

This court, established in [illegible],[27] has general jurisdiction of all "claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any negotiation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable. Exception is, however, made of "claims growing out of the late civil war," and "other claims which have hitherto been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same."[27]

The court also has jurisdiction to adjudicate upon all claims which may from time to time be referred to it by an executive department of the United States, involving disputed facts or questions of law where the amount involved is greater than $3,000, or where the decision will affect a class of cases or furnish a precedent for the executive departments in the adjustment of such classes of claims, or where an authority, right, privilege, or exemption is claimed or denied under the Constitution.

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[26] See Chapter LV.

[27] 10 Stat. at L. 612.

[27] 24 Stat. at L. 505; Chap. 359.

In these cases where the decision is in favor of the claimant, judgment may be entered payable out of the Treasury of the United States.

Upon questions of law an appeal lies in all cases at the instance of the United States to the Supreme Court, and at the instance of the claimants where the amount claimed exceeds $3,000. The findings of fact by the Court of Claims is final and conclusive.

By the so-called Bowman Act of March 3, 1883,[28] the head of an executive department is authorized to refer to the court any claim or matter pending in his department which involves controverted questions of fact or of law, and the court is directed to report its findings of facts and conclusions of law to the department for its guidance. The act also provides that either House of Congress or any of its committees may refer any claim or matter to the court for the determination of the facts involved, and the report of the same to Congress for such action thereupon as it may see fit to take.

As to the foregoing the District Courts are given concurrent jurisdiction where the amount does not exceed $1,000; and the circuit courts concurrent jurisdiction where the amount exceeds $1,000, but is not greater than $10,000.

All causes are tried by the court without a jury. All claims not brought within six years of the date of their accruing are barred from prosecution.

By various acts Congress has from time to time conferred upon the court additional jurisdiction with reference to specific classes of cases, as for example, French Spoliation claims, Indian depredation claims, claims for bounties for war vessels captured or destroyed during the war with Spain, and claims arising out of payment of customs duties to the authorities in Porto Rico while that island was under military rule.

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[28] 22 Stat. at L. 485.

§ 567. Jurisdiction of Federal Courts Based upon Diversity of Citizenship.

By the Constitution jurisdiction in the federal courts may be founded upon either the subject-matter enumerated in Article III, or upon the character of the parties, that is, where the controversy is one to which the United States is a party, or between two or more States, between a State and citizens of another State, between citizens of different States, or between a State or a citizen thereof and foreign States, citizens or subjects.

Within the meaning of the clause of the Constitution extending the federal judicial power to suits between citizens of different States it has been held that any person who is a citizen of the United States, native or naturalized, is a citizen of the State in which he is domiciled. United States citizens domiciled in the Territories or the District of Columbia do not come within this rule.[29]

In Strawbridge v. Curtis[30] it was held that if there be two or more joint plaintiffs and two or more joint defendants, each of the plaintiffs must, by reason of citizenship of another State, be capable of suing each of the defendants in a federal court, in order to sustain the federal jurisdiction. This doctrine, thus declared, has never been departed from.[31]

§ 568. Citizenship of Corporations.

It was early decided that a corporation is not a citizen within the meaning of the clause providing that the federal judicial power shall extend to controversies between citizens of different States, and in theory this is still the law; but if each corporation was conclusively presumed to be a citizen of the State by which it is chartered the practical results would be precisely the same as it now is and for many years has in fact been. Until about 1840, however, the doctrine prevailed that a corporation being

[29] New Orleans v. Winter, 1 Wh. 91; 4 L. ed. 44; Hepburn v. Ellzey, 2 Cr. 445; 2 L. ed. 332.

[30] 3 Cr. 267; 2 L. ed. 435.

[31] See Hooe v. Jamieson, 166 U. S. 395; 17 Sup. Ct. Rep. 596; 41 L. ed. 1049, and cases there cited.

an artificial unit, the court would look behind its corporate personality to see whether the individuals of which it was composed were, each and every one of them, citizens of a State different from that of each of the parties sued.[32] But in later cases this doctrine was repudiated, and the principle stated, first, that the citizenship of the individuals composing the corporation is to be presumed to be that of the State by which the company was chartered, and, still later, that this presumption is one that may not be rebutted. In Ohio & Mississippi R. R. Co. v. Wheeler[33] the court say, citing Louisville, C. & C. R. R. Co. v. Letson:[34] "Where a corporation is created by the laws of a State, the legal presumption is, that its members are citizens of the State in which alone the corporate body has a legal existence; and that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body; and that no averment or evidence to the contrary is admissible, for the purpose of withdrawing the suit from the jurisdiction of a court of the United States."

This presumption, conclusive as to the citizenship of the corporation, is no presumption at all as to the citizenship of one of the individual stockholders in case that individual stockholder sues or is sued by the corporation even when such suit is brought to enforce rights or liabilities directly resulting from his relation as a stockholder. In such case a stockholder, if a plaintiff, may assert that he is a citizen of the State in which his citizenship actually is, and he may describe himself as a stockholder of the defendant corporation and yet the federal courts will conclusively presume that every stockholder of the defendant corporation is a citizen of the same State as that which chartered the corporation.

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[32] Bank of United States v. Deveaux, 5 Cr. 61; 3 L. ed. 38; Bank of Vicksburg v. Slocomb, 14 Pet. 60; 10 L. ed. 354.

[33] 1 Black, 286; 17 L. ed. 130.

[34] 2 How. 497; 11 L. ed. 353.

A corporation organized in two or more States cannot sue in the federal courts a citizen of any one of those States.[35]

In St. Louis & San Francisco Ry. v. James[36] the doctrine was advanced, but rejected by the court, that a corporation chartered in one State and authorized by the law of another State to do business therein and to have there all the privileges of a domestic corporation, might, as a citizen of the latter State, bring a suit in the federal courts against a citizen of the State of its incorporation.[37]

In Patch v. Wabash Ry. Co.[38] it is held that a corporation organized under the laws of several States, including the one in which suit against it is brought, may not obtain removal into the federal courts by reason of its citizenship also of another State.

§ 569. National Banks.

When the present national banking system was established, and for more than twenty years afterwards, an express statute authorized the National Banks to sue and be sued in the federal courts. Since 1887 it has been provided by law that for the purposes of the jurisdiction of the federal courts national banks are to be held to be citizens of the States in which they are respectively located, and the federal courts have no other jurisdiction over controversies to which they are a party than they would have were such banks citizens of such States.[39]

§ 570. Federally Chartered Corporations.

It has also been held that a corporation chartered by the United States, except as specifically restricted by Congress, has the right to invoke jurisdiction of the federal courts in respect to any litigation which it may have.[40]

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[35] Ohio R. R. Co. v. Wheeler, 1 Black, 286; 17 L. ed. 130.

[36] 161 U. S. 545; 16 Sup. Ct. Rep. 621; 40 L. ed. 802.

[37] See also Martin v. B. & O. Ry., 151 U. S. 673; 14 Sup. Ct. Rep. 533; 38 L. ed. 311; Southern Pacific Ry. v. Denton, 146 U. S. 202; 13 Sup. Ct. Rep. 44; 36 L. ed. 942.

[38] 207 U. S. 277; 28 Sup. Ct. Rep. 80; 52 L. ed. 204.

[39] 24 Stat. at L. 552.

[40] Osborn v. Bank of United States, 9 Wh. 738; 6 L. ed. 204; Pacific Railroad Removal Cases, 115 U. S. 1; 5 Sup. Ct. Rep. 1113; 29 L. ed. 319.

§ 571. Fictitious Citizenship.

Federal jurisdiction may not be created by the fictitious assignment of the cause of action, but where the transfer is real, and for a consideration, federal jurisdiction will attach even though the transfer is shown to have been made with this end in view. In Dickerman v. Northern Trust Co.[41] the court say: "It is well settled that a mere colorable conveyance of property, for the purpose of vesting title in a non-resident and enabling him to bring suit in a federal court, will not confer jurisdiction; but if the conveyance appears to be a real transaction, the court will not, in deciding the question of jurisdiction, inquire into the motives which actuated the parties in making the conveyance. The law is equally well settled that, if a person take up a *bona fide* residence in another State, he may sue in a federal court, notwithstanding his purpose was to resort to a forum of which he could not have availed himself if he were a resident of the State in which the court was held."[42]

In order that there may be federal jurisdiction, mere residence in another State is not sufficient. There must be diversity of citizenship, and this fact must affirmatively appear in the pleadings.[43]

§ 572. Federal Jurisdiction of Cases Arising under the Constitution, Treaties and Acts of Congress.

The Constitution provides that the federal judicial power shall extend to "all cases, in law or equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority."

In order that federal judicial power may attach under this grant it is necessary that the controversy shall constitute what in law is technically known as a "case;" and that, for its deci-

[41] 176 U. S. 181; 20 Sup. Ct. Rep. 311; 44 L. ed. 423.

[42] Citing Cheever v. Wilson, 9 Wall. 108; 19 L. ed. 604.

[43] Wood v. Wagnon, 2 Cr. 9; 2 L. ed. 191; Wolfe v. Hartford Life Insurance Co., 148 U. S. 389; 13 Sup. Ct. Rep. 602; 37 L. ed. 493.

sion, the enforcement of some federal right is *substantially* involved.[44]

A case is not brought within federal judicial cognizance simply because, in the progress of the litigation, it becomes necessary to refer to or give a construction to the federal Constitution or laws of the United States. "The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved."[45]

In Cableman v. Peoria, etc., R. R. Co.[46] it is held that the bare fact that the appointment of a receiver is by a federal court does not make all actions against him cases arising under the Constitution or laws of the United States which he can remove on that ground into the federal court, unless his appointment has been not under the general equity powers of a chancery court, but pursuant to a special federal law. The court, citing previous cases, say: "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the

[44] In Osborn v. Bank of United States (9 Wh. 738; 6 L. ed. 204) Chief Justice Marshall says: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. The power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

[45] Gold Washing & Water Co. v. Keyes, 6 Otto, 199; 24 L. ed. 656.

[46] 179 U. S. 335; 21 Sup. Ct. 171; 45 L. ed. 220. The ordinary rule is that no receiver may be sued except by leave of the Court which appointed him, but Congress has provided that every receiver or manager of any property appointed by any Court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the Court in which such receiver or manager was appointed.

record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained."

But the federal judicial power attaches when it is shown that a federal right is substantially involved, whether express or implied: "The jurisdiction of the courts of the United States is properly commensurate with every right and duty created, declared, or necessarily implied, by and under the Constitution and laws of the United States. Those courts are created courts of common law and equity; and under whichsoever of these classes of jurisprudence such rights and duties may fall, or be appropriately ranged, they are to be taken cognizance of and adjudicated according to the settled and known principles of that division to which they belong." [47]

In Shoshone Mining Co. v. Rutter[48] the general extent of the federal judiciary power as determined by subject-matter rather than diversity of citizenship, is stated and the authorities reviewed.

§ 573. Removal of Suits from State to Federal Courts.

The protection of federal law and federal rights against possible invasion by state law and state authorities may be secured in three ways. First, by vesting in the federal courts exclusive cognizance of all cases in which the enforcement of federal rights created or recognized by the Constitution, treaties, or congressional statutes, is involved; Second, by providing that all cases, involving these rights, which originate and are prosecuted in the state courts may be finally appealed to the federal courts; and, Third, by providing that such cases begun in the state courts may at some stage prior to final judgment therein, be removed into the federal courts. All these methods have been employed since the beginning of the present government.

[47] Irvine v. Marshall, 20 How. 558; 15 L. ed. 994.

[48] 177 U. S. 505; 20 Sup. Ct. Rep. 726; 44 L. ed. 864.

Constitution within the possible cognizance of the federal courts. Over a very large proportion of these cases Congress has not seen fit to confer jurisdiction on any federal court. As to certain of these cases the federal jurisdiction is held to be necessarilly exclusive, and it may by Congress be made so as to all, but as to others the state courts may be permitted to adjudicate concurrently. That is to say, as to these cases, the two systems of courts may at the same time have equal authority, the suitors being given the option as to which tribunals shall be resorted to.[50]

This concurrence of jurisdiction is founded upon the fact as declared in Claflin v. Houseman[51] that while every citizen of a State is a subject of two distinct sovereignties, these sovereignties are not foreign to each other but have concurrent authority as to place and persons though distinct as to subject-matters, and that therefore, as the court say: "Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its Constitution in the exercise of such jurisdiction. Thus a legal or equitable right acquired under state laws, may be prosecuted in the state courts, and also, if the parties reside in different States, in the federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the state courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under the law of the United States, Congress may, if it see fit, give to the federal courts exclusive jurisdiction."

In the case of The Moses Taylor,[52] decided in 1866, the Supreme Court with reference to the relation between the two systems of courts, declared as follows:

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[50] Subject, of course, to the right of removal from the state to the federal courts, and appeal to the Supreme Court of the United States by writ of error.

[51] 93 U. S. 130; 23 L. ed. 833.

[52] 4 Wall. 411; 18 L. ed. 397.

"How far this judicial power is exclusive, or may, by the legislation of Congress be made exclusive, in the courts of the United States, has been much discussed, though there has been no direct adjudication upon the point. In the opinion delivered in the case of Martin v. Hunter's Lessee (1 Wheat. 304; 4 L. ed. 97), Mr. Justice Story comments upon the fact that there are two classes of cases enumerated in the clause cited between which a distinction is drawn; that the first class includes cases arising under the Constitution, laws and treaties of the United States, cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction and that, with reference to this class, the expression is that the judicial power shall extend to all cases, but that in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word 'all' is dropped. And the learned justice appears to have thought the variation in the language the result of some determinate reason, and suggests that, with respect to the first class, it may have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to all cases, and, with respect to the latter class, to leave it to Congress to qualify the jurisdiction in such manner as public policy might dictate. Many cogent reasons and various considerations of public policy are stated in support of this suggestion. The vital importance of all the cases enumerated in the first class to the national sovereignty is mentioned as a reason which may have warranted the distinction, and which would seem to require that they should be vested exclusively in the National Courts — a consideration which does not apply, at least with equal force, to cases of the second class. Without, however, placing implicit reliance upon the distinction stated, the learned justice observes, in conclusion, that it is manifest that the judicial power of the United States is, in some cases, unavoidably exclusive of all state authority, and that in all others it may be made so at the election of Congress. We agree fully with this conclusion. The legislation of Congress has proceeded upon this supposition. The

Judiciary Act of 1789, in its distribution of jurisdiction to the several federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the federal courts. It declares that in some cases, from their commencement, such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the state courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offenses, are placed, from their commencement, exclusively under the cognizance of the federal courts.

"On the other hand, some cases, in which an alien or a citizen of another state is made a party, may be brought either in a federal or a state court at the option of the plaintiff; and if brought in a state court may be prosecuted until the appearance of the defendant, and then, at his option, may be suffered to remain there, or may be transferred to the jurisdiction of the federal courts.

"Other cases, not included under these heads, but involving questions under the Constitution, laws, treaties, or authority of the United States, are only drawn within the control of the federal courts upon appeal or writ of error, after final judgment.

"By subsequent legislation of Congress, and particularly by the legislation of the last four years, many of the cases, which by the Judiciary Act could only come under the cognizance of the federal courts after final judgment in the state courts, may be withdrawn from the concurrent jurisdiction of the latter courts at earlier stages, upon the application of the defendant.

"The constitutionality of these provisions cannot be seriously questioned, and is of frequent recognition by both state and federal courts."

§ 575. Statutory Provision for Removal from State to Federal Courts.

By the original Judiciary Act of 1789 it was provided that suits brought in state courts might be removed into the federal courts only in case all the necessary defendants were aliens or all the necessary plaintiffs were citizens of the State and all the necessary defendants were citizens of another State and all joined in the petition for removal. By the act of 1866 individual defendants were permitted to remove if their interests could be properly adjudicated without the presence of the other defendants.

By act of 1867 either a plaintiff or defendant could remove upon affidavit that local prejudice would prevent a fair trial. By act of 1887 this right was limited to the defendant. By act of 1875 it was declared that either defendant or plaintiff might remove any case of which the federal circuit and the state courts had concurrent jurisdiction. By acts of 1887 and 1888 the jurisdiction of the circuit courts was considerably reduced, which of course had the effect of reducing the rights of removal provided for by the act of 1875.

The laws at present governing removal of suits to the federal circuit courts are the act of August 13, 1888,[53] and sections 641, 642, 643 of the Revised Statutes. Section 2 of the act of 1888 provides:

"§ 2. That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district.[54] Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the pre-

[53] 25 Stat. at L. 433.

[54] For section 1 of this act see *ante*, p. 980, footnote.

ceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to such circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided,* That if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said state court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to

the satisfaction of said court that said party will not be able to obtain justice in such state court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." [55]

By section 641 of the Revised Statutes it is provided that: "When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial, into the next circuit court to be held in the district where it is pending." [56]

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[55] Mere allegation of local influence or prejudice is not sufficient. There must be presented some legal proof, as, for instance, the affidavit of a creditable person. *In re* Pennsylvania Co., 137 U. S. 451; 11 Sup. Ct. Rep. 141; 34 L. ed. 738.

[56] This section goes on to provide that it shall be the duty of the clerk of the state court to furnish the defendant, petitioning for removal, with copies of the process against him, all pleadings, depositions, testimony, etc., and that if the clerk shall neglect or refuse to do this, the federal court may require the plaintiff to file a declaration, petition, or complaint in the cause, and in case of his default, may order a nonsuit and dismiss the case at the costs of the plaintiff, and that such dismissal shall be a

Section 643 of the Revised Statutes provides also that: "When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon petition of such defendant to said circuit court." The section goes on to provide for issuance of writ by habeas corpus by the federal court to obtain the custody of the defendant.[57]

§ 576. Congress May not Confer Jurisdiction upon State Courts.

As has been pointed out in Section 574 the state courts possess jurisdiction over certain cases concurrently with that possessed by the federal courts. This, however, is not a jurisdiction which is conferred upon them by federal statute, but one which they possess under state law and which they are permitted to retain even after the same jurisdiction is by act of Congress conferred upon the inferior federal tribunals. Congress, indeed, is without power to confer jurisdiction upon any courts not created by itself.[58]

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bar to any further suit touching the matter in controversy. Section 642 provides for the issuance of the writ of habeas corpus to obtain the custody of the defendant. A valuable discussion of the scope and intent of these sections is to be found in Kentucky v. Powers, 201 U. S. 1; 26 Sup. Ct. Rep. 387; 50 L. ed. 633.

[57] For further consideration of this law see in this treatise, Chapter VII.

[58] Houston v. Moore, 5 Wh. 1; 5 L. ed. 19.

Congress may, however, delegate to state courts the performance of certain routine functions which do not involve the trial of "cases."[59] Any state chancellor, judge, justice of the peace, etc., may cause to be arrested and commited or held to trial any person charged with an offense against the United States.

[59] In Robertson v. Baldwin (165 U. S. 275; 17 Sup. Ct. Rep. 326; 41 L. ed. 715), the court say: "The better opinion is that the second section of Article III of the Constitution was intended as a constitutional definition of the judicial power which the Constitution intended to confine to courts created by Congress; in other words, that such power extends only to the trial and determination of 'cases' in courts of record, and that Congress is still at liberty to authorize the judicial officers of the several States to exercise such power as is ordinarily given to officers of courts not of record; such, for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States, to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power rather than a part of the judicial power itself. . . . In the case of Prigg v. Pennsylvania (16 Pet. 539; 10 L. ed. 1060), it was said that, as to the authority conferred on state magistrates to arrest fugitive slaves and deliver them to their owners, under the act of February 12, 1793, while a difference of opinion existed, and might still exist upon this point in different States, whether state magistrates were bound to act under it, no doubt was entertained by this court that state magistrates might, if they chose, exercise the authority unless prohibited by state legislation. See also Moore v. Illinois, 14 How. 13; 14 L. ed. 306; *In re* Kaine, 14 How. 103; 14 L. ed. 345. We think the power of justices of the peace to arrest deserting seamen and deliver them on board their vessels is not within the definition of the 'judicial power' as defined by the Constitution, and may be lawfully conferred on state officers."

CHAPTER LI.

POLITICAL QUESTIONS.

§ 577. Political Questions.

Elsewhere in this treatise the well-known and well-established principle is considered that it is not within the province of the courts to pass judgment upon the policy of legislative or executive action. Where, therefore, discretionary powers are granted by the Constitution or by statute, the manner in which those powers are exercised is not subject to judicial review. The courts, therefore, concern themselves only with the question as to the existence and extent of these discretionary powers.

As distinguished from the judicial, the legislative and executive departments are spoken of as the political departments of government because in very many cases their action is necessarily dictated by considerations of public or political policy. These considerations of public or political policy of course will not permit the legislature to violate constitutional provisions, or the executive to exercise authority not granted him by the Constitution or by statute, but within these limits they do permit the departments, separately or together, to recognize that a certain set of facts, that a given status, exists, and these determinations, together with the consequences that flow therefrom, may not be traversed in the courts.

In the exercise of his political powers, not only the President, but those acting under his order are exempt from judicial control. In Marbury v. Madison,[1] Marshall says: "By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to

[1] 1 Cr. 137; 2 L. ed. 60.

appoint certain officers, who act by his authority, and in conformity with his orders. In such cases their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist no power to control that discretion. The subjects are political. They respect the Nation, not individual rights, and, being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of Congress for establishing the department of foreign affairs. This officer as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is to be communicated. The acts of such an officer, as an officer, can never be examined by the courts."

No comprehensive enumeration of these political determinations has been attempted by the courts, nor, indeed, is such an enumeration possible. Specifically, however, the following have been decided, as the cases have arisen, to be political and, therefore, not justiciable:

§ 578. Cherokee Indians v. Georgia.

In the Cherokee Nation v. Georgia[2] an injunction was prayed to restrain the State of Georgia from executing certain laws within that State, which, it was alleged, would annihilate the Cherokees as a political body. The suit was dismissed on the ground of lack of jurisdiction, it being held that the Cherokee Nation was not a foreign State in the sense in which the term is used in the provision of the Constitution which extends the federal judicial power to "controversies between a State or the citizens thereof, and foreign States, citizens or subjects." Marshall, however, in his opinion went on to say: "A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a State from the forcible exercise of legislative power over a neighboring people asserting their independence, their right to which the State denies. On several of the matters

alleged in the bill, for example on the laws making it criminal to exercise the usual powers of self-government in their own country by the Cherokee Nation, this court cannot interpose, at least in the form in which those matters are presented. That part of the bill which respects the land occupied by the Indians and prays the aid of the court to protect their possession may be more doubtful. The mere question of right might be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may well be questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question." As this last sentence shows, all of Marshall's opinion what has been quoted was purely *obiter,* but was later relied upon by the court in Georgia v. Stanton.[3]

§ 579. Georgia v. Stanton.

The difficulty sometimes experienced in deciding between a justiciable and a non-justiciable question is well illustrated in this latter case.

Here a bill was filed invoking the original jurisdiction of the Supreme Court to restrain the Secretary of War, the General of the Army, and Major-General Pope from putting into effect the acts of Congress of 1867, providing for military government in the State of Georgia.[4] The bill alleged that the intent of the acts of Congress as apparent on their face and by their very terms was to overthrow the existing constitutional government of the

[2] 5 Pet. 1; 8 L. ed. 25.

[3] 6 Wall. 50; 18 L. ed. 721.

[4] In Mississippi v. Johnson (4 Wall. 475; 18 L. ed. 437) the attempt had been made to restrain the President of the United States from executing the reconstruction acts, but the bill had been dismissed on the ground that an injunction or mandamus would not lie to the chief executive of the nation.

State and to substitute an unconstitutional one therefor. In declining to issue the orders prayed for, the court say:

"In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul and totally abolish the existing State Government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the State, by depriving it of the means and instrumentalities whereby its existence might, and otherwise would, be maintained.

"This is the substance of the complaint, and of the relief prayed for. The bill, it is true, sets out in detail the different and substantial changes in the structure and organization of the existing government, as contemplated in these acts of Congress; which, it is charged, if carried into effect by the defendants, will work this destruction. But, they are grievances, because they necessarily and inevitably tend to the overthrow of the State as an organized political body. They are stated, in detail, as laying a foundation for the interposition of the court to prevent the specific execution of them; and the resulting threatened mischief. So in respect to the prayers of the bill. The first is, that the defendants may be enjoined against doing or permitting any act or thing, within or concerning the State, which is or may be directed, or required of them, by or under the two acts of Congress complained of; and the remaining four prayers are of the same character, except more specific as to the particular acts threatened to be committed.

"That these matters, both as stated in the body of the bill, and in the prayers for relief, call for the judgment of the court upon political questions, and upon rights, not of person or property but of a political character, will hardly be denied. For the rights, for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and

privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court." [5]

§ 580. Existence and Territorial Extent of Sovereignty.

The existence and territorial extent of the sovereignty of a State, involving, of course, the question as to the *de jure* character of a government, have been held to be political questions.

In Foster v. Neilson[6] was involved the determination whether Spain or the United States had sovereignty over a given district. The decision as to this, the court held, was a purely political one to be made by the executive, and without judicial power of revision. In his opinion Marshall declares: "If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations is, as has been truly said, more a political than a legal question, and in its discussion, the courts of every country must respect the pronounced will of the legislature."

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[5] "It is true," the opinion continues, "the bill, in setting forth the political rights of the State, and of its people to be protected, among other matters, avers that Georgia owns certain real estate and buildings therein, State Capitol and executive mansion, and other real and personal property; and that putting the acts of Congress into execution, and destroying the State, would deprive it of the possession and enjoyment of its property. But it is apparent that this reference to property and statement concerning it, are only by way of showing one of the grievances resulting from the threatened destruction of the State, and in aggravation of it, not as a specific ground of relief. This matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief. Indeed the case, as made in the bill, would have stopped far short of the relief sought by the State, and its main purpose and design given up, by restraining its remedial effect, simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us."

[6] 2 Pet. 253; 7 L. ed. 415.

In *Ex parte* Cooper[7] the court expressed itself bound by the action of the political departments claiming jurisdiction to an extent exceeding fifty-nine miles from the shore of Alaska. It was intimated, however, that should a case involving private rights arise, but bearing upon a point public in its nature which had not been passed upon by the political departments, the court would be constrained itself to decide the point.

The political departments of the United States Government, that is to say, the executive and legislative departments, have the final and conclusive word not only as to the existence of American sovereignty over a given district, but as to which of two or more contending foreign States has *de jure* jurisdiction. This was declared in Williams v. Suffolk Insurance Co.[8] In this case a vessel, insured generally against loss, was ordered by the government of Buenos Ayres not to catch seal off the Falkland Islands. The master of the schooner denied the jurisdiction of Buenos Ayres, and was captured and condemned by the authorities of Buenos Ayres. Upon suit being brought for the insurance, these facts were set up by the insurers. The Supreme Court, however, refused to consider the evidence as to sovereignty, but held itself concluded by the action of the political departments of the United States Government, saying: "Can there be any doubt that when the executive branch of the government, which is charged with the foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know that, in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union. If this were not the rule cases might often arise in which, on most important questions of foreign jurisdiction, there would be an irreconcilable difference

[7] 143 U. S. 472; 12 Sup. Ct. Rep. 453; 36 L. ed. 232.
[8] 13 Pet. 415; 10 L. ed. 226.

between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States whilst the other would consider it in a state of war. No well-regulated government has ever sanctioned a principle so unwise, and so destructive of national character."

Again, in Jones v. United States[9] the court say: "Who is the sovereign *de jure* or *de facto* of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens and subjects, of the government. All courts are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings."

§ 581. War: Belligerency: Neutrality.

From the cases already cited, it follows that determinations by the political departments as to existence of a status of independence, or of war, or of belligerency, are not reviewable by the courts.

In United States v. Palmer[10] Marshall declares: "Those questions which respect the rights of a part of a foreign empire which asserts or is contending for its independence, and the conduct which must be observed by the courts of the Union towards the subjects of such section of an empire who may be brought before the tribunals of this country . . . are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise, to whom are entrusted all its foreign relations, than to that tribunal whose power as well as duty is

[9] 137 U. S. 202; 11 Sup. Ct. Rep. 80; 34 L. ed. 691.
[10] 3 Wh. 610; 4 L. ed. 471.

confined to the application of the rule which the legislature may prescribe for it. In such contests a nation may engage itself with the one party or the other — may observe absolute neutrality — or may make a limited recognition of it. The proceedings in the court must depend so entirely on the course of the government that it is difficult to give a precise answer to questions which do not refer to a particular nation. It may be said, generally, that if the government remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against the enemy. To decide otherwise, would be to determine that the war prosecuted by one of the parties was unlawful, and would be to array the nation to which the court belongs against that party. This would transcend the limits prescribed to the judicial department." [11]

Of course the courts of one country are not bound by the decisions of another country as to the territorial extent of jurisdiction of that country, or indeed as to any question of international law and right. In Rose v. Himely[12] the court, speaking through the mouth of Marshall, says: "Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign nation must judge, and its decisions must be respected. But if it exercise a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded by foreign courts. This distinction is taken upon this principle, that the law of nations is the law of all tribunals in the society of nations, and is supposed

[11] In The Divina Pastora (4 Wh. 52; 4 L. ed. 512) Marshall again says: "The decision at the last term, in the case of the United States v. Palmer, establishes the principle that the government of the United States, having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts which war authorizes, and which the new governments in South America may direct against their enemy." See also The Santissima Trinidad, 7 Wh. 283; 5 L. ed. 454, and Kennett v. Chambers, 14 How. 38; 14 L. ed. 316.

[12] 4 Cr. 241; 2 L. ed. 608.

to be equally understood by all. Thus the sentence of a court sitting in a neutral territory, and instituted by a belligerent, has been declared not to change the property it confessed to condemn; and thus the question whether a prize court sitting in the country of the captor could condemn property lying in a neutral port, has been fully examined, and although the jurisdiction of the court in such case was admitted, yet no doubt appears to have been entertained of the propriety of examining the question, and deciding it according to the practice of the nations."

§ 582. Treaties.

Whether or not a treaty or other international agreement which the United States may have entered into with a foreign country has been sufficiently ratified by that country is for the political departments of our government to determine, as is also the continuing existence of a treaty.[13]

§ 583. Diplomatic Agents.

Whether or not a given person is to be recognized as the accredited agent, consular or diplomatic, of a foreign government, is, also, a question for final determination by the political department.[14]

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[13] In Doe v. Braden (16 How. 635; 14 L. ed. 1090) the court say: "It is said, however, that the King of Spain by the constitution under which he was then acting and administering the governments, had not the power to annul it by treaty or otherwise; that if the power existed anywhere in the Spanish government it resided in the Cortes; and that it does not appear, in the ratification, that it was annulled by that body or by its authority or consent. But these are political questions and not judicial. They belong exclusively to the political department of the government."

In Terlinden v. Ames (184 U. S. 270; 22 Sup. Ct. Rep. 484; 46 L. ed. 534) the question was as to whether a treaty entered into between the United States and Prussia in 1852 was still in existence, although by the entrance of the latter country into the German Empire, it had ceased to be an independent State. The court held that the political departments of the United States had continued to treat the treaty as subsisting and that they were bound thereby, saying: "Without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance."

[14] *Ex parte* Baiz, 135 U. S. 403; 10 Sup. Ct. Rep. 854; 34 L. ed. 222.

§ 584. Other Political Questions.

The extent of the immunity from judicial control of matters of international concern is well illustrated in the case of United States *ex rel.* Boynton v. Blaine,[15] decided in 1890, in which the general doctrine was reviewed and affirmed that mandamus will not issue to control the executive department with reference to claims prosecuted by it against foreign governments in behalf of private persons. In this case a mandamus was sought to compel the Secretary of State to pay over to the petitioner certain sums of money paid to the United States by Mexico under an award made in his favor under a convention that had been entered into between the United States and Mexico. The Secretary of State, acting under the direction of the President, was withholding the payment to the petitioner pending an investigation of fraud. The court held that the matter was still pending before the department, that the principle of *res adjudicata* could not be invoked against the United States by the individual claimants, and that the judicial department could not intervene.

In Luther v. Borden[16] it was held that the judiciary was not competent to reverse the decision of the political departments of the National Government as to which of two contesting organizations is the *de jure* government of a State of the Union. *A fortiori* it was held that it was not competent for state courts to question the *de jure* character of the government from which they derived their standing as courts.

In Martin v. Mott[17] it was held that the courts could not question the correctness of the decision of the President, acting under the authority of a law enacted February 28, 1795, as to the necessity for calling out the militia to repel an invasion or suppress an insurrection.

In Neely v. Henkel[18] the court held that it was not competent for the judiciary to make any declaration as to the length of time

[15] 139 U. S. 306; 11 Sup. Ct. Rep. 607; 35 L. ed. 183.
[16] 7 How. 1; 12 L. ed. 851.
[17] 12 Wh. 19; 6 L. ed. 537.
[18] 180 U. S. 109; 21 Sup. Ct. Rep. 302; 45 L. ed. 448.

Cuba should be occupied and controlled by the military forces of the United States, "it being," said the court, "the function of the political branch of the government to determine when such occupation and control shall cease, and, therefore, when the troops of the United States shall be withdrawn from Cuba."

In United States v. Holliday[19] the existence of tribal relations among Indians was declared to be a matter for political determination.

§ 585. Suits Between the States.

Though questions of the extent of political jurisdiction are, as has been seen, essentially political in character, they are as between the individual States of the Union justiciable in the Supreme Court. This, however, is due to the express provision of the Constitution giving to that court original jurisdiction over "controversies between two or more States." This precise question is more particularly discussed in a later chapter dealing with suits between States.[20]

§ 586. Courts Will Exercise Jurisdiction when Private Rights are Involved.

In all these cases the courts have held themselves bound by the positions assumed by the executive and legislative departments. When, however, private justiciable rights are involved in a suit, the court has indicated that it will not refuse to assume jurisdiction even though questions of extreme political importance are also necessarily involved.

Thus, as has been set forth in another chapter, treaties entered into by the United States not only bind the United States internationally, but create municipal law for individuals so far as their personal rights and property are concerned. Thus a treaty having been entered into the courts will follow its terms even when, by doing so, it has to go counter to the position previously assumed

[19] 3 Wall. 407; 18 L. ed. 182.

[20] Chap. LIII.

by the executive department, or, indeed, contended for by the government in the case at bar.

In *Ex parte* Cooper[21] the court, after asserting the principle that it would not pass upon a matter purely political in character, are careful to say:

"We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if those rights are dependent upon the construction of acts of Congress or of a treaty, and the case turns upon a question, public in its nature, which has not been determined by the political departments in the form of a law specifically settling it, or authorizing the executive to do so, to render judgment, since we have no more right to decline the jurisdiction which is given than to usurp that which is not given."

In the year following that in which this case was decided, the United States entered into a convention with Great Britain providing for an arbitration of the political question (the extent of territorial sovereignty of the United States in the Behring Sea) involved in the Cooper case. An award was made under this convention, and Congress passed an act giving to it full effect. Later a case again coming before a federal circuit court of appeals, that tribunal held itself conclusively bound by the terms of the convention in opposition to the position of the political department at the time of the Cooper case. The opinion declares:

"This question has been settled by the award of the arbitrators, and this settlement must be accepted 'as final.' It follows therefrom that the words 'in the waters thereof,' as used in section 1956, and the words 'dominion of the United States in the waters of Behring Sea,' in the amendment thereto, must be construed to mean the waters within three miles from the shore of Alaska. In coming to this conclusion, this court does not decide the question adversely to the political department of the government. It is undoubtedly true, as has been decided by the Supreme Court, that, in pending controversies, doubtful questions which are undecided must be met by the political department of the govern-

[21] 143 U. S. 472; 12 Sup. Ct. Rep. 453; 36 L. ed. 232.

ment. 'They are beyond the sphere of judicial cognizance,' and 'if a wrong has been done, the power of redress is with Congress, not with the judiciary.' The Cherokee Tobacco, 11 Wall. 616; 20 L. ed. 227. But in the present case there is no pending case left undetermined for the political department to decide. It has been settled. The award is to be construed as a treaty which has become final. A treaty when accepted and agreed to becomes the supreme law of the land. . . . The duty of courts is to construe and give effect to the latest expression of the sovereign will; hence it follows that, whatever may have been the contention of the government at the time *In re* Cooper was decided, it has receded therefrom since the award was rendered, by an agreement to accept the same 'as a full, complete and final settlement of all questions referred to by the arbitrators,' and from the further fact that the government since the rendition of the award has passed 'an act to give effect to the award rendered by the tribunal of arbitration.'" [22]

Commenting on this case, Judge Baldwin observes: "It will be noted that this result was reached in a suit by the United States in one of their own courts, in which the claim of the government was one of territorial boundary, and yet that court overruled the claim and threw out the suit on the strength of an award made in pursuance of the law of the land. The treaty was the law. This law provided for the award and made it, whichever view should be adopted, final. It was therefore for the court to accept it as final, even against the resistance of the political department of the government, and do justice accordingly." [23]

§ 587. Courts Will Not Perform Administrative Functions.

From the foregoing it appears that the courts themselves decline to assume jurisdiction with reference to matters of a political character. So also, they have held that it is beyond the constitutional power of Congress to impose upon them the performance of duties essentially administrative in nature. The instances in

[22] The La Ninfa, 75 Fed. Rep. 513.
[23] *The American Judiciary*, p. 41.

which the inferior federal courts have refused to perform administrative functions are considered in a later chapter.[24] So also, it has been held that these courts sitting as equity tribunals may exercise only those powers of English courts of chancery which were judicial in character, and not those exercised by the chancellor as the representative of the King and by virtue of the King's prerogative as parens patriae.[25]

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[24] Chapter LXIII, The Separation of Powers.

[25] Fontain v. Ravenel, 17 How. 369; 15 L. ed. 80.

CHAPTER LII.

THE LAW ADMINISTERED BY FEDERAL COURTS.

§ 588. Federal Courts and International Law.

Thus far in our consideration of the federal courts we have been concerned with their organization and fields of jurisdiction. We turn now to an inquiry as to the law which they administer.

When exercising jurisdiction determined by the nature of the subjects litigated, which subjects have been placed by the Constitution within the legislative control of Congress, the federal courts, of course, administer the federal statutes and the Constitution so far as it is self-executory. In one case at least, in maritime and admiralty matters, the grant by the Constitution of judicial power has been construed to carry with it a grant of legislative power to provide the law to be applied.[1] Where the federal courts obtain jurisdiction wholly because of the character of the parties, the federal courts, generally speaking, apply the state or other law which would apply were the suits brought in the state courts. The exceptions to this rule have in a measure been already considered in connection with the impairment of the obligation of contracts, and will be further considered in the next following section. In the present section will be considered the force and applicability of principles of international law in the federal courts.

In so far as applicable, American courts apply established doctrines of international law. Not, however, in the sense that they apply a body of law which has not been derived from and based upon the sovereign will of the American State, but upon the theory that this body of rules is first impliedly adopted by the State and thus made a portion of its own municipal law. Resting thus upon the implied assent and adoption of the United States, these principles of international law are subject to express

[1] See Section 646.

modification by statute. In the very early case of The Charming Betsy,[2] decided in 1804, it seems to have been accepted as a principle not needing argument that the court would be bound by an act of Congress providing a rule different from that laid down by international law, the only observation made being that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." In The Nereide[3] Marshall again declares: "Till an act [of Congress] be passed, the court is bound by the law of nations, which is a part of the law of the land."

In Hilton v. Guyot[4] the court say: "International law in its widest and most comprehensive sense — including not only questions of right between nations, governed by what has been appropriately called the law of nations, but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominion of another nation — is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

"The most certain guide no doubt for the decisions of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is whenever it becomes necessary to do so in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations."[5]

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[2] 2 Cr. 64; 2 L. ed. 208.

[3] 9 Cr. 388; 3 L. ed. 769.

[4] 159 U. S. 113; 16 Sup. Ct. Rep. 139; 40 L. ed. 95.

[5] Citing Fremont v. United States, 17 How. 542; 15 L. ed. 241; Sears v. The Scotia, 14 Wall. 170; 20 L. ed. 822; Respublica v. De Longchamps, 1 Dall. 111; 1 L. ed. 59; Moultrie v. Hunt, 23 N. Y. 394, 396.

In the case of The Lottawanna, *sub nomine* Rodd v. Heart,[6] is set out in the clearest possible manner the extent to which, and the manner in which, any body of law not originally municipal, may, by adoption, become such. That case had reference to the adoption by the United States of the general principles of maritime law, but, as is pointed out in the argument, the principle is the same with reference to international law. Justice Bradley, speaking for the court, said:

"The ground on which we are asked to overrule the judgment in the case of The General Smith is, that by the general maritime law, those who furnish necessary materials, repairs and supplies to a vessel, have a lien on such a vessel therefor, as well when furnished in her home port as when furnished in a foreign port, and that the courts of admiralty are bound to give effect to that lien.

"The proposition affirms that the general maritime law governs this case, and is binding on the courts of the United States.

"But it is hardly necessary to argue that the general maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each State only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several States of this Union also presents an analogous case. It is the basis of all the State laws; but is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common law by those who use them. But, like those laws, however fixed, definite and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced

[6] 21 Wall. 558; 22 L. ed. 654.

it. And without such voluntary adoption it would not be law. And thus it happens, that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world."

An interesting case with reference to the municipal force of international usages is The Paquete Habana.[7]

This case involved the question whether, in the absence of a municipal law so providing, the principle that fishing smacks belonging to an enemy are not subject to seizure in time of war, had become so well recognized in international law as to warrant the court in declaring illegal a capture made by the United States naval forces. In its opinion the court say: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

After an exhaustive examination of precedents, and of views of commentators, the court say: "This rule of international law is one which prize courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter."[8]

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[7] 175 U. S. 677; 20 Sup. Ct. Rep. 290; 44 L. ed. 320.

[8] In a dissenting opinion by the Chief Justice, Justices Harlan and McKenna concurring, the argument is not so much a denial that the exemption of

is, they may, if not already known to the court, be ascertained by the court by its own study of the proper sources of information.[9]

§ 589. Federal Criminal Law.

There is no common, non-statutory, federal criminal law. The federal courts have no criminal jurisdiction save that given them by statute of Congress; and no act is recognized as a crime against the peace of the United States except such as has been declared such by act of Congress; and Congress has of course no constitutional power to define as a crime and affix a penalty to the commission thereof, except as to subjects or in places which the Constitution places under federal control, or as a means of compelling obedience to the laws which Congress is constitutionally empowered to enact.

But though the federal courts have no common-law federal jurisdiction, and though there is no common, non-statutory criminal law for them to administer, they may, and indeed have been authorized by statute to adopt common-law remedies and punishments where Congress has not otherwise provided. Thus section 722 of the Revised Statutes reads:

"The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title and of Title "Civil Rights" and of the Title "Crimes," for the protection of all persons in the United States in their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and law of the United States, shall be extended to govern the said courts in the

[9] The Scotia, 14 Wall. 170; 20 L. ed. 822.

trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

In Tennessee v. Davis,[10] a case removed from the state into the federal court under section 643 of the Revised Statutes, it was argued that no mode of procedure in trial of the criminal offense charged had been prescribed by act of Congress. The court, however, said: "While it is true there is neither in section 643 nor in the act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered, the cause when removed shall proceed as a cause originally commenced in that court, yet the mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case."

§ 590. Federal Courts and the Construction of State Laws.

By the Constitution the federal courts are given jurisdiction of all suits between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

In this grant of jurisdiction the determining factor is not the nature of the matter litigated or the law involved, but the character of the parties to the suits. No question of federal concern, and no construction of a federal law or constitutional provision may be involved. The subjects to be determined may, and, indeed, usually, in this class of cases, depend wholly upon the

[10] 100 U. S. 257; 25 L. ed. 648.

interpretation and application of the laws of one or more of the States. The object in giving this jurisdiction to the federal courts is thus not the protection of federal rights, privileges, and immunities, but the provision of tribunals presumably more impartial than would be state tribunals when called upon to adjudicate between citizens of the State in which they are sitting and citizens of other States. This purpose is stated by Hamilton in No. LXXX of *The Federalist.* With reference to the clause of the Constitution providing that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States," he writes: "And if it be a just principle, that every government ought to possess the means of executing its own provisions, by its own authority, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities, to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases, in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial, between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded."

That this exposition of Hamilton's correctly exhibits the aim sought by this provision is also shown by the debates in the Constitutional and State ratifying Conventions.[11]

In short, the theory is that the federal courts when thus called upon by reason of the diversity of the citizenship of the parties to construe and apply state law, are to consider themselves as *ad hoc* agents of the State, and, therefore, under an obligation to apply that law as they find it. This obligation was recognized in the 34th section of the original Judiciary Act of 1789, now section 721 of the Revised Statutes, which provides that: "The laws of the several States, except where the Constitution,

[11] See, for example, *Elliot's Debates*, III, 533, 557, 566.

treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." This provision has remained unaltered to the present day, and constitutes section 721 of the Revised Statutes.

§ 591. Force of State Interpretations.

What the proper construction of the state law is, which they are to apply, the Supreme Court of the United States has repeatedly declared is, subject to the exceptions hereinafter to be described, to be determined by the interpretation that has been given to it by the State that has enacted it. In Elmendorf v. Tyler[12] Marshall says: "The judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. . . . On this principle the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle the construction given by the courts of the several States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws, and treaties of the United States." Again, in Shelby County v. Guy,[13] the Supreme Court declare: "Nor is it questionable that a fixed and received construction of their respective statute laws in their own courts makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious that this admission may at times involve us in seeming inconsistencies, as when States have adopted the same statutes and their courts differ in their construction. Yet that course is necessarily indicated by the duty laid on us to administer, as between certain individuals, the laws of their respective States according to the best lights we possess of what those laws are."

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[12] 10 Wh. 152; 6 L. ed. 289.
[13] 11 Wh. 361; 6 L. ed. 495.

Again, in Polk's Lessee v. Wendell[14] the court say: "The sole object for which jurisdiction of cases between citizens of different States is vested in courts of the United States, is to secure to all the administration of justice upon the same principles on which it is administered between citizens of the same State. Hence, this court has never hesitated to conform to the settled doctrines of the States on landed property, where they are fixed, and can be satisfactorily ascertained; nor would it ever be led to deviate from them in any case that bore the semblance of impartial justice."[15]

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[14] 5 Wh. 293; 5 L. ed. 92.

[15] In *Re* Duncan (139 U. S. 449; 11 Sup. Ct. Rep. 573; 35 L. ed. 219) the contention was raised that a certain law appearing upon the statute books had not been constitutionally passed and was, therefore, not valid. As to this the Supreme Court of the United States said: "It is unnecessary to enter upon an examination of the rulings in the different States upon the question whether a statute duly authenticated, approved and enrolled can be impeached by resort to the journals of the legislature or other evidence for the purpose of establishing that it was not passed in the manner prescribed by the state Constitution. The decisions are numerous, and the results reached fail of uniformity. The courts of the United States necessarily adopt the adjudication of the state courts on the subject." Citing South Ottawa v. Perkins, 94 U. S. 260; 24 L. ed. 154; Post v. Supervisors, 105 U. S. 667; 26 L. ed. 1204; Railroad Co. v. Georgia, 98 U. S. 359; 25 L. ed. 185.

In Daly v. James (8 Wh. 495; 5 L. ed. 670) Justice Johnson in a dissenting opinion says: "Upon the question so solemnly pressed upon this court in the argument how far the decision of the court of Pennsylvania ought to have been considered as obligatory in this court, I would be understood as entertaining the following views: As precedents entitled to the highest respect the decisions of the state courts will always be considered; and in all cases of local law we acknowledge an established and uniform course of decisions of the state courts in the respective States as the law of this court; that is to say, that such decisions will be as obligatory upon this court as they would be acknowledged to be in their own courts."

In a dissenting opinion Justice Field in B. & O. R. R. Co. v. Baugh (149 U. S. 368; 13 Sup. Ct. Rep. 914; 37 L. ed. 772) declares: "The theory upon which inferior courts of the United States take jurisdiction within the several States is, when a right is not claimed under the Constitution, laws, or treaties of the United States, that they are bound to enforce as between the parties the law of the State. It was never supposed that upon matters arising within the State any law other than that of the State would be enforced, or that any attempt would be made to enforce any other law. It was never supposed that the law of the State would be enforced

§ 592. Rule not One of Constitutional Necessity: Exceptions.

From the quotations which have been made, the general rule governing the construction of state law by the federal courts is sufficiently clear. We have now to consider the exceptions which have been made to its application.

First of all it is to be observed that the rule itself would appear to be one not so much of imperative constitutional necessity, as of comity adopted by the federal courts from a proper sense of the respect due to the States whose law they are supposed to administer, and that, therefore, the provision of section 721 of the Revised Statutes states a purely statutory and not a constitutional requirement.

§ 593. Equity.

Even this statutory requirement, it is to be observed, is a limited one, its application being limited to trials at common law, the entire field of equity procedure thus being omitted from its control.[16]

In the comparatively early case of Boyle v. Zacharie[17] the Supreme Court said: . . . "The acts of Maryland regulating the proceedings on injunctions, and other chancery proceedings, and giving certain effects to them in courts of law, are of no force in relation to the courts of the United States.

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differently by the federal courts sitting in the State and the state courts; that there would be one law when a suitor went into the state courts, and another law when the suitor went into the federal courts, in relation to a cause of action arising within the State,— a result which must necessarily follow if the law of the State can be disregarded upon any view which the federal judges may take of what the law of the State ought to be rather than what it is."

The whole question of the binding force upon the federal courts of state laws as interpreted by the state courts is considered in the Dred Scott case (Scott v. Sandford, 19 How. 393; 15 L. ed. 691), a majority of the court agreeing that the court was bound by the last decision of the Missouri court as to the effect of Scott's temporary residence in a free State.

[16] By an act of May 8, 1792, it was provided, that the procedure in equity cases in the federal courts should be according to the peculiar principles, rules, and usages of equity as distinguished from common law courts.

[17] 6 Pet. 635; 8 L. ed. 527.

"The chancery jurisdiction given by the Constitution and laws of the United States is the same in all the States of the Union, and the rule of decision is the same in all. In the exercise of that jurisdiction the courts of the United States are not governed by the State practice; but the act of Congress of 1792 (ch. 36) has provided that the modes of proceeding in equity suits shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law. And the settled doctrine of this court is, that the remedies in equity are to be administered, not according to the state practice but according to the practice of courts of equity in the parent country, as contradistinguished from courts of law, subject of course to the provisions of the act of Congress, and to such alterations and rules as in the exercise of the powers delegated by those acts, the courts of the United States may, from time to time, prescribe." [18]

[18] *Cf.* Russell v. Southard, 12 How. 139; 13 L. ed. 927; Bein v. Heath, 12 How. 168; 13 L. ed. 939; Payne v. Hook, 7 Wall. 425; 19 L. ed. 260; Robinson v. Campbell, 3 Wh. 212; 4 L. ed. 372; U. S. v. Howland, 4 Wh. 108; 4 L. ed. 526; McConihay v. Wright, 121 U. S. 201; 7 Sup. Ct. Rep. 940; 30 L. ed. 932; Neves v. Scott, 13 How. 268; 14 L. ed. 140.

In Neves v. Scott (13 How. 268; 14 L. ed. 140) the court say: "Whenever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them to each particular case, as they may find justly applicable thereto. These principles may take part of the law of a State, or they may have been modified by its legislation, or usages, or they may never have existed in its jurisprudence. Instances of each kind may now be found in the several States. But in all the States, the equity law, recognized by the Constitution and by Acts of Congress, and modified by the latter, is administered by the courts of the United States, and upon appeal by this court."

In Payne v. Hook (7 Wall. 425; 19 L. ed. 260) the court, with reference to the argument that inasmuch as under the law of the State a chancery court had not jurisdiction in the premises, the federal court sitting as such had not, said: "If legal remedies are sometimes modified in the federal courts to suit the changes in the laws of the States, and the practice of their courts, it is not so with the equitable. The equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different States of the Union."

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ence to the federal legislative authority over the rules of evidence to be followed in the federal courts, it is declared in Potter v. National Bank:[20] "It is quite true that the 34th section of the Judiciary Act of 1789 — preserved *totidem verbis,* in section 721 of the present revision of the statutes — has been construed as requiring the federal courts, in all civil cases at common law, not within the exceptions named, to observe, as rules of decision, the rules of evidence prescribed by the laws of the States in which such courts respectively sit. But that section of the Act of 1789, as does section 721 of the Revised Statutes, expressly excepts from its operations cases 'Where the Constitution, treaties or statutes of the United States otherwise provide.' We have seen that the existing statutes of the United States do 'otherwise provide,' in that they forbid the exclusion of a witness upon the ground that he is a party to or interested in the issue, in any civil action whatever pending in a federal court, except in a certain class of actions, which do not embrace the one now before us. 'In all other respects,' that is, in all cases not provided for by the Statutes of the United States, the laws of the State, in which the federal court sits, constitute rules of decision as to the competency of witnesses in all actions at common law, in equity or in admiralty. It is clear, therefore, that the law of Illinois can have no bearing upon a case which, as here, is embraced or has been provided for by the federal statute."[21]

Section 914 of the Revised Statutes provides that in the federal courts in civil causes other than equity and admiralty, "the practice, pleadings and forms and modes of proceeding" shall conform "as near as may be" to the existing practice in the States in which they sit. There is thus left, even as to these cau[illegible]rtunity for v[illegible]nce of practice whether because of

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constitutional necessity, as for example with reference to jury trial, or because of statutory direction. Thus the rules with reference to the compulsory production of documentary evidence, the amendment of pleadings, etc., are fixed by federal statute. So also, it is held that federal judges are not bound by state rules with reference to instructing the jury, the granting of new trials, the submission of special issues to the jury, the preparation of a case for appeal, etc.[22]

§ 595. Unsettled Construction of State Law.

In Green v. Neal[23] it was held that where a state court had changed its former construction of a law, the federal courts, upon a subsequent case coming before them, should do likewise and thus keep ever in accord with the latest decisions of the state courts. "The same reason," the opinion declares, "which influences this court to adopt the construction given to the local law in the first instance, is not less strong in favor of following it in the second, if the state tribunals should change the construction." The court, however, adds: "A reference is here made, not to a single adjudication, but to a series of decisions which shall settle the rule." And in Leffingwell v. Warren[24] the court say: "The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text (citing numerous cases). If the highest judicial tribunal of a State adopt new views as to the proper construction of such statute, and reverse its former decisions, this court will follow the latest settled adjudications." Here again it will be observed that the court is careful to say not that it will always follow the latest construction of the state courts but the "latest settled adjudications."

It would appear then from these and other cases that though in general the federal courts when called upon to apply state

[22] *Cf.* Bates.
[23] 6 Pet
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laws will follow the last interpretation given to them by the respective state courts, this will not necessarily be done where a change of construction by the state courts has been a recent one, and not supported by such a line of decisions as to have become, to use the language of the opinion in Shelby v. Guy,[25] "a fixed and received construction," and especially where the construction is one that for a considerable period of time has been the uniformly accepted one in the state courts.

As will later appear,[26] the Supreme Court has held quite firmly to the doctrine that the construction by the state courts of the law relating to real property is to be followed by the federal courts, but in the recent case of Kuhn v. Fairmont Coal Co.,[27] decided January 3, 1910, the court hold that this shall be the practice only where the state determinations have become established rules of property and action prior to the accruing of the rights of the parties litigant. In this case prior adjudications are reviewed and explained, the language employed in East Central Eureka Min. Co. v. Central Eureka Min. Co.[28] and Brine v. Hartford Fire Ins. Co.[29] being especially defined and restrained.[30]

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[25] 11 Wh. 361; 6 L. ed. 495.

[26] Section 600.

[27] 30 Sup. Ct. Rep. 140.

[28] 204 U. S. 266; 27 Sup. Ct. Rep. 258; 51 L. ed. 476.

[29] 96 U. S. 627; 24 L. ed. 858.

[30] The following are given as rules that are "no longer to be questioned."

"1. When administering state laws and determining rights accruing under those laws, the jurisdiction of the federal courts is an independent one, not subordinate to, but co-ordinate and concurrent with, the jurisdiction of the state courts.

"2. Where, before the rights of the parties accrued, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the federal court as authoritative declarations of the law of the State.

"3. But where the law of the State has not been thus settled, it is not only the right, but the duty, of the federal court to exercise its own judgment, as it also always does when the case before it depends upon doctrines of commercial law and general jurisprudence.

"4. So, when contracts and transactions are entered into and rights have accrued under a particular state or local decision, or where there has been no

§ 596. The Obligation of Contracts and the Construction of State Law.

In an earlier chapter has been considered the circumstances under which the federal courts refuse to be bound by the construction given to state law by the state courts when the impairment of the obligation of contracts is involved.[31]

§ 597. Federal Courts and the Common Law.

The general principle usually stated is that there is no federal common law — that, in other words, the law which the federal courts apply consists wholly and exclusively of the federal Constitution, treaties, the statutes of Congress, and the laws common and statutory of the several States of the Union.

The common law of the States consists of the principles of the English common law, developed and modified by American custom and judicial precedent. Having this great common substratum of the English common-law principles, the non-statutory law of the several States is, in very many respects, the same throughout the United States. But in other respects, statutory enactment and divergent customs and judicial determinations have led to important differences.

In general, however, excepting where statutes have expressly amended the English common law as it was at the time of the separation from England, or where clear judicial *dicta* to the contrary are to be found, the general doctrines of the English common law are held to be in force.[32]

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decision by the state court on the particular question involved, then the federal courts properly claim the right to give effect to their own judgment as to what is the law of the State applicable to the case, even where a different view has been expressed by the state court after the rights of the parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the federal court should always lean to an agreement with the state court if the question is balanced with doubt."

Justices Holmes, White, and McKenna dissented.

[31] Chapter XLVIII.

[32] Louisiana, whose law is founded on the Roman civil law, is an exception to this, but statute and judicial practice have brought the Louisiana law a long way toward conformity to the common law.

Strictly applying the doctrine that the federal courts, when exercising jurisdiction derived from the character of the parties to the causes tried, will apply the laws of the States applicable thereto, there is left no room for a federal common law, for, when not applying state law, the federal courts have only the function of interpreting and applying the federal Constitution and the treaties entered into and the laws passed in pursuance thereof.

That the federal courts have no jurisdiction derived directly from the common law has been unquestioned since the early case of *Ex parte* Bollman,[33] in which the court say:

"As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the Constitution or by the laws of the United States. Courts which originate in the common law possess a jurisdiction which must be regulated by the common law until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied. The reasoning from the bar, in relation to it, may be answered by the single observation, that for the meaning of the term habeas corpus, resort must unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by the written law."

That the federal courts not only have no common-law jurisdiction, but that, generally speaking, there is no federal common law as distinguishable from statute law (Constitution, treaties, acts of Congress) was declared in the comparatively early case of Wheaton v. Peters.[34] In that case the court say:

"It is clear that there can be no common law of the United States. The Federal Government is composed of twenty-four

[33] 4 Cr. 75; 2 L. ed. 554.

[34] 8 Pet. 591; 8 L. ed. 1055.

sovereign and independent States, each of which may have its local usages, customs and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative action." [35]

§ 598. Interstate Commerce and Common Law.

This general doctrine that there is no federal common law requires considerable explanation, if not qualification. In the first place, with reference to those matters of which interstate commerce is the most important example, general common-law principles are held, in the absence of express legislative provision to the contrary, to apply.

In Western Union Telegraph Co. v. Call Publishing Co.,[36] decided in 1901 and reaffirming the doctrines of previous cases, with reference to the subject of interstate commerce, the court say:

"There is no body of federal common law separate and distinct from the common law existing in the several States, in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress." After defining the term "common law," the court continue: "Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative

[35] It should be said that the federal power to adopt common-law principles by statutory action may be exercised only with reference to those matters which by the Constitution are within the sphere of federal regulation.

[36] 181 U. S. 92; 21 Sup. Ct. Rep. 561; 45 L. ed. 765.

upon all interstate commercial transactions, except so far as they are modified by congressional enactment."

The principle here stated with reference to the subject of interstate commerce would seem to be applicable with reference to all other matters falling within the control of the Federal Government.

§ 599. General Principles of the Common Law as Distinguished from Their Special and Local Applications.

In Olcott v. The Supervisors[37] Justice Strong, speaking for the court, says: "It must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the Constitution or statutes of a State, which the federal courts adopt as rules for their own judgments. That Whiting v. Fond du Lac County [a state decision sought to be held as controlling upon the federal courts] was not a determination of a question of local law is manifest. It is not claimed to have been that. But it is relied upon as having given a construction to the Constitution of the State. Very plainly, however, such was not its character or effect. The question considered by the court was not one of interpretation or construction. The meaning of no provision of the state Constitution was considered or declared. What was considered was the uses for which taxation generally, taxation by any government, might be authorized, and particularly whether the construction and maintenance of a railroad owned by a corporation, is a matter of public concern. . . . It was decided that building a railroad, if it be constructed and owned by a corporation, though built by authority of the State, is not a matter in which the public has any interest of such a nature as to warrant taxation in its aid. For this reason it was held that the State had no power to authorize the imposition of taxes to aid in the construction of such a railroad and therefore that the statute giving Fond du Lac County power to extend such aid was invalid. This was a determination of no local question,

[37] 16 Wall. 678; 21 L. ed. 382.

or question of statutory or constitutional law construction. It was not decided that the legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the Constitution of any other State as it has to the State of Wisconsin. Its solution must be sought not in the decisions of any single state tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power are matters which, like questions of commercial law, no state court can conclusively determine for us. This consideration alone satisfies our minds that Whitney v. Fond du Lac County furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect."

§ 600. General Commercial Law: Swift v. Tyson.

The doctrine that when the question is not one of peculiarly local law and local interest, the federal courts will determine for themselves, without reference to the decisions of local courts what the law is, even though it be with reference to subjects exclusively within the legislative control of the States, and over which the federal courts obtain jurisdictional power only by reason of the citizenship of the parties litigant, has received especial application in the field of commercial law.

This principle with reference to commercial law was first laid down by the Supreme Court in the case of Swift v. Tyson,[38] in which case, decided in 1842, was involved a doctrine of commercial law as applied to a New York transaction. The language of Justice Story who prepared the opinion has given rise to so much discussion that it will be necessary to quote it at length. He says:

"Admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court,

[38] 16 Pet. 1; 10 L. ed. 865.

if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed or ancient local usage: but they deduce the doctrine from the general principles of commercial law. It is, however, contended, that the 34th section of the Judiciary Act of 1789 furnishes a rule obligatory upon this court to follow the decisions of the State tribunals, in all cases to which they apply. That section provides 'that the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.' In order to maintain the argument, it is essential, therefore, to hold, that the word 'Laws' in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to state laws strictly local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was supposed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordi-

nary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.*

"It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying, that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments." [39]

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[39] In the important case of Burgess v. Seligman (107 U. S. 20; 2 Sup. Ct. Rep. 10; 27 L. ed. 359) the general attitude of the federal courts with reference to following the construction given by the state courts to state law is reviewed and stated as follows:

"The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and

The doctrine declared in Swift v. Tyson has continued to guide the Supreme Court. Under its operation it has come about that it depends in many cases upon whether suit is brought in a federal or a state court, as to what law will be held applicable to the matter in dispute.[40]

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effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that, by the course of their decisions, certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

[40] *Cf.* Brooklyn City, etc., Ry. Co. v. National Bank, 102 U. S. 14; 26 L. ed 61.

In Smith v. Alabama (124 U. S. 465; 8 Sup. Ct. Rep. 564; 31 L. ed. 508) the court say: "A determination in a given case of what that [common] law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstances that the courts of the United States, in cases within their jurisdiction where they are called upon to administer the law of the State in which they sit, or by which the transaction is governed, exercise an independent,

The doctrine of Swift v. Tyson has become so well established that there is little utility in questioning its abstract correctness. Several points may, however, be adverted to. First, it may be pointed out that its effect is to substitute law of federal creation (or at least federal judicial determination) for the state law with reference to matters which by the federal Constitution are left within the exclusive legislative power of the State.

Second: it may well be questioned whether there exists any "general commercial law," such as the Supreme Court asserts to exist, and which it claims not itself to create but to find in existence, and to apply in place of the local peculiar law as laid down by the state courts.

In fact it would seem, as appears from the opinions of the Supreme Court, that a conceived convenience has been the real force leading the court to its position upon this point. And even as to this it may be doubted whether general commercial convenience is greatly advanced by a result which makes the law of a particular case depend in many instances upon the particular court — state or federal — in which it happens to be brought.[41]

Finally, it is to be observed that the doctrine of Swift v. Tyson, however correct in principle, by no means furnishes a means whereby a uniform code of commercial law for the entire United States may be developed. In the first place, as already pointed out, such decisions as are declared under it are controlling only in the federal courts. The state courts still remaining free to adopt them or reject them as they see fit.[42] In the second place the doctrine is applicable in the federal courts themselves only

though concurrent, jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of New York C. R. Co. v. Lockwood (17 Wall. 357; 21 L. ed. 627), where the common law prevailing in the State of New York in reference to the liability of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied is none the less the law of that State."

[41] See generally in criticism of Swift v. Tyson, Hare's *American Constitutional Law*, Lecture LI.

[42] Delmas v. Merchants' Mutual Ins. Co., 14 Wall. 661; 20 L. ed. 757. Professor Schofield questions whether it was necessary to admit this right of the state courts. See *Illinois Law Rev.* IV, 547.

with reference to those questions of commercial law upon which there is in the State whose law is involved, no defining statute, or well-established local usage. Thus whatever may have been the doctrine adopted by the federal courts as deducible from the principles of general commercial law, it could not apply in a State in which a statute or well-established usage prescribes a different one. In other words, the doctrine of Swift v. Tyson goes no farther than to permit the federal courts to disregard those decisions of state courts which have themselves been founded, not upon statute or usage, but upon the abstract principles of general commercial law.

Summing up the discussion of the topic of the federal courts and state laws, it is apparent that in a number of directions the federal courts, while deriving jurisdiction from the nature of the parties but presumably applying state law, have in fact built up for themselves a considerable body of law which is neither laid down in the federal Constitution, treaties, and laws of Congress nor in conformity with the laws of the States as determined by their respective judicial tribunals.

Whether this body of law may properly be termed federal common law may possibly be questioned. It is unquestionably federal in the sense that it owes its authority to, and is applied by, the federal courts; and it is common in that it may be enforced by the federal courts throughout the Union. There is, however, good reason for holding that it is essentially state law. The fact that it differs from the law as laid down by the state courts is due to the peculiar circumstance that, under our judicial system, two co-ordinate sets of courts have the power to interpret and determine the common law of the several States. In other words, the federal courts have taken the position that, when sitting for the enforcement of state laws, they do not sit as tribunals subordinate to the state courts, but as tribunals co-ordinate with them; and that, therefore, they have an independent right to determine what is the non-statutory law of the State, using for that purpose the same sources of information that the state courts use in determining for themselves the same facts.

CHAPTER LIII.

SUITS BETWEEN STATES AND TO WHICH A STATE OR THE UNITED STATES IS A PARTY PLAINTIFF.

§ 601. Constitutional Provisions.

Article III of the Constitution provides that the judicial power of the United States shall extend "to controversies between two or more States." During the colonial period disputes between the colonies, especially those in relation to boundaries, had been settled in the English courts. Thus, for example, Mason and Dixon's Line was thus established.[1] Other intercolonial disputes were settled by the British Privy Council; for example, between Massachusetts and New Hampshire and New York in 1764.[2]

Under the Articles of Confederation, it had been provided that "The United States, in Congress assembled, shall . . . be the last resort, on appeal, in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever."

This jurisdiction, the Articles went on to provide, should be exercised by Congress by the appointment for each case of a special tribunal whose decision should be final and conclusive. Under the power thus granted a number of intercolonial disputes were presented. Two of these (between Massachusetts and New York, and South Carolina and Georgia) were settled by compromise out of court. A third, between Pennsylvania and Connecticut, resulted in the confirmation to Pennsylvania of the Wyoming region.[3] Upon the whole, however, it would appear that this mode of settlement of disputes between the colonies proved by no means effective, for in Rhode Island v. Massachusetts[4] we find Justice Baldwin in his opinion saying: "It is

[1] Penn. v. Baltimore, 1 Vesey, 44.

[2] *Cf.* Story, *Commentaries on the United States Constitution*, § 1675.

[3] Jameson, *Essays in Constitutional History*, Chapter I.

[4] 12 Pet. 657; 9 L. ed. 1233.

a part of the public history of the United States of which we cannot be judicially ignorant, that at the adoption of the Constitution there were existing controversies between eleven States respecting their boundaries, which arose under their respective charters and had continued from the first settlement of the colonies."

§ 602. Boundary Disputes.

The most important class of cases which have required the exercise of the authority granted by the Supreme Court under the present Constitution to adjudicate between States have been those relating to disputed boundaries.

The first of these was that of New Jersey v. New York.[5] In his opinion awarding the process of subpœna, Chief Justice Marshall, after reciting the constitutional grant of judicial power, and referring to previous suits to which States had been parties and which had been entertained by the Supreme Court, said: "It has then been settled by our predecessors on great deliberation, that this court may exercise its original jurisdiction in suits against a State, under the authority conferred by the Constitution and existing acts of Congress." The chief justice goes on to observe that should a defendant State, after due service of process, fail to appear (and, it is to be remarked that there is no means whereby a State may be compelled to appear in a suit brought against it) the complainant has the right to proceed *ex parte* to a final judgment.

The second boundary dispute between States brought before the Supreme Court was between Rhode Island and Massachusetts.[6] This suit was brought in 1832, but was not finally determined until 1838. In this case it was strenuously urged that the consent which the States, by the adoption of the Constitution, had given for the entertainment by the Supreme Court of suits between themselves extended only to matters ordinarily judicially cogniz-

[5] 5 Pet. 284; 8 L. ed. 127.

[6] Rhode Island v. Massachusetts, 12 Pet. 657; 9 L. ed. 1233.

able, and that it did not extend to suits of a political character, such as was a dispute regarding boundaries.[7]

Justice Baldwin rendered the prevailing opinion of the court. After calling attention to the rule that in the construction of the Constitution the state of things existing at the time of its framing and adoption was to be considered, he says: "With the full knowledge that there were at its adoption, not only existing controversies between two States singly, but between one State and two others, we find the words of the Constitution applicable to this state of things, 'controversies between two or more States.' It is not known that there were any such controversies then existing, other than those which relate to boundary, and it would be a most forced construction to hold that these were excluded from judicial cognizance, and that it was to be confined to controversies to arise prospectively on the other subjects. This becomes the more apparent when we consider the context and those parts of the Constitution which bear directly on the boundaries of States, by which it is evident that there remained no power in the contending States to settle a controverted boundary between themselves, as States competent to act by their own authority on the subject-matter, or in any department of the government, if it was not in this."

After calling attention to the fact that by the Constitution the States were expressly prohibited from entering into any agreement or compact between themselves, save with the consent of Congress, and that this clause had been already held by the States, by Congress, and by the court to include agreements with reference to boundaries, Justice Baldwin declares that every reason would lead to the same construction of the grant to the federal courts of judicial power. "Controversies abount boundary," he says, "are more serious in their consequences upon the contending States, and their relations to the Union and governments, than compacts and agreements. If the Constitution has given to no department the power to settle them they must remain interminable; and as

[7] The Constitution does not in terms extend the federal judicial power to *all* cases between States.

the large and powerful States can take possession to the extent of their claim, and the small and weak ones must acquiesce and submit to physical power, and the possession of the large States must consequently be peaceable and uninterrupted; prescription will be asserted, and whatever may be the right and justice of the controversy, there can be no remedy, though just rights may be violated. Bound hand and foot by prohibitions of the Constitution, a complaining State can neither treat, agree, nor fight with the adversary without the consent of Congress; a resort to judicial power is the only means left for legally adjusting, or persuading a State which has possession of disputed territory, to enter into an agreement or compact relating to a controverted boundary. Few, if any, will be made when it is left to the pleasure of the State in possession; but when it is known that some tribunal can decide on the right, it is most probable that controversies can be settled by compact. There can be but two tribunals under the Constitution who can act on the boundaries of States, the legislative or the judicial power; and the former is limited in express terms to assent or dissent, where a compact or agreement is referred to them by the States, and as the latter can be exercised only by this court, when a State is a party, the power is here or cannot exist." There then follows, in the opinion, a careful examination of English and earlier American precedents to show that boundary disputes were not, in their nature, outside the scope of judicial power.[8]

In Florida v. Georgia,[9] Missouri v. Iowa,[10] Florida v. Georgia,[11] Alabama v. Georgia,[12] Virginia v. West Virginia,[13] South Carolina v. Georgia,[14] Indiana v. Kentucky,[15] Virginia v. Tennessee,[16] Iowa

[8] A dissenting opinion was filed by Justice Taney.
[9] 11 How. 293; 13 L. ed. 702.
[10] 7 How. 660; 12 L. ed. 861.
[11] 17 How. 478; 15 L. ed. 181.
[12] 23 How. 505; 16 L. ed. 556.
[13] 11 Wall. 39; 20 L. ed. 67.
[14] 93 U. S. 4; 23 L. ed. 782.
[15] 136 U. S. 479; 10 Sup. Ct. Rep. 1051; 34 L. ed. 329.
[16] 158 U. S. 267; 15 Sup. Ct. Rep. 818; 39 L. ed. 976.

v. Illinois,[17] and Louisiana v. Mississippi,[18] the Supreme Court has without objection assumed jurisdiction in cases involving disputes as to jurisdiction.[19] In Virginia v. West Virginia the attempt was again made by the defendant State to raise the question as to the judicial character of boundary controversies, but the court said, without dissent as to this point, speaking through Justice Miller: "This proposition cannot be sustained without reversing the settled course of decision in this court and overturning the principles on which several well considered cases have been decided. . . . We consider . . . the established doctrine of this court to be that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render affects the jurisdiction and sovereignty of the States which are parties to the proceedings."

§ 603. Maladministration of Laws of a State to Injury of Citizens of Another State not Justiciable in a Suit Between the States.

In Louisiana v. Texas[20] complaint was made by the plaintiff State that the agents of the defendant State were administering certain quarantine powers in a manner that discriminated against citizens of the plaintiff State. To this bill demurrer was filed upon the ground, *inter alia,* that the issues presented by the bill were not between the two States, but between certain citizens of the State of Louisiana, engaged in interstate commerce, and that the State, as a State, was not interested in a proprietary or other manner, and was not, therefore, entitled to bring suit. In the opinion of the court, rendered by Chief Justice Fuller, it was said: "In order . . . to maintain jurisdic-

[17] 202 U. S. 59; 22 Sup. Ct. Rep. 571; 50 L. ed. 934.

[18] 202 U. S. 1; 26 Sup. Ct. Rep. 408; 50 L. ed. 913.

[19] The cases of Virginia v. West Virginia, South Carolina v. Georgia, and Virginia v. Tennessee arose out of compacts made between the States.

[20] 176 U. S. 1; 20 Sup. Ct. Rep. 251; 44 L. ed. 347.

tion of this bill of complaint, as against the State of Texas, it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in the vindication of the grievances of particular individuals."

. . . "The complaint here is not that the laws of Texas in respect to quarantine are invalid, but that the health officer, by rules and regulations framed and put in force by him thereunder, places an embargo in fact on all interstate commerce between the State of Louisiana and the State of Texas, and that the governor permits these rules and regulations to stand and be enforced, although he has the power to modify or change them. The bill is not rested merely on the ground of the imposition of an embargo without regard to motive, but charges that the rules and regulations are more stringent than called for by the particular exigency, and are purposely framed with the view to benefit the State of Texas, and the city of Galveston in particular, at the expense of the State of Louisiana, and especially of the city of New Orleans.

"But in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another. The States cannot make war or enter into treaties, though they may, with the consent of Congress, make compacts and agreements. When there is no agreement whose breach might create it, a controversy between States does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one State to a distinct collision with a sister State.

"In our judgment this bill does not set up facts which show that the State of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two States are in controversy within the meaning of the Constitution."

§ 604. State as Parens Patriae: Missouri v. Illinois.

In Missouri v. Illinois[21] was raised the interesting point whether the general health and prosperity of its citizens give to a State, as such, an interest sufficiently direct to enable it to prosecute a suit for equitable relief in their behalf against another State. This case arose out of the construction, under the authority of the State of Illinois, by the Sanitary District of Chicago, of an artificial drainage canal by which large quantities of sewage were carried into and thus polluted the river of Mississippi which furnishes the water supply to inhabitants of the State of Missouri.

After an exhaustive examination of cases in which the court had entertained suits in which either plaintiff or both plaintiffs and defendants had been States, the court in their majority opinion say: "From the language, alone considered, it might be concluded that whenever and in all cases where one State may choose to make complaint against another, no matter whether the subject of complaint arises from the legislation of the defendant State, or from acts of its officers and agents, and no matter whether the nature of the injury complained of is to affect the property rights or the sovereign powers of the complaining State, or to affect the rights of its citizens, the jurisdiction of this court would attach." But after quoting from Marshall's opinion in Cohens v. Virginia,[22] which would seem to sustain this broad construction of the court's jurisdiction, the opinion declares: "But it must be conceded that upon further consideration, in cases arising under different states of fact, the general language used in Cohens v. Virginia has been, to some extent, modified." As instances of this modification, the cases of New Hampshire v. Louisiana, Wisconsin v. Pelican Insurance Co., and Louisiana v. Texas are cited. But even as to these cases it is pointed out that the court did not decline jurisdiction, but, after inquiry into their nature and the character of the relief prayed for, held either that the plaintiff State was not entitled to, or at least that the Supreme Court could

[21] 180 U. S. 208; 21 Sup. Ct. Rep. 331; 45 L. ed. 497.
[22] 6 Wh. 264; 5 L. ed. 257.

not grant this relief. The opinion then continues: "The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a State. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable, and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court."

As to the case at bar, the court say: "An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that if the health and comfort of the inhabitants of a State are threatened, a State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the General Government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering."

It will thus be seen that in this case the court held that, under certain circumstances, a State can invoke the original jurisdiction of the Supreme Court even though it has no direct pecuniary or proprietary interests involved, but is standing, as it were, as trustee, *parens patriæ,* or representative of a considerable portion of its citizens.[23]

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[23] Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan and Mr. Justice White, dissented. The dissenting opinion read:

"Controversies between the States of this Union are made justiciable by the Constitution because other modes of determining them were surrendered; and before that jurisdiction which is intended to supply the place of the

§ 605. Irrigation Works: Kansas v. Colorado.

In Kansas v. Colorado[24] the question was raised whether one State has the right, by the construction of its irrigation works, seriously to deplete the water supply of a river which, rising in the defendant State, by nature flows into and through the plaintiff State. The case thus involved not only the technical question of the rights of riverain States to the water of rivers flowing into and through their respective territories, but whether the conflict of interests was one justiciable in the Supreme Court. The court

means usually resorted to by independent sovereignties to terminate their differences can be invoked, it must appear that the States are in direct antagonism as States. Clearly this bill makes out no such state of case.

"If, however, on the case presented, it was competent for Missouri to implead the State of Illinois the only ground on which it can be rested is to be found in the allegation that its governor was about to authorize the water to be turned into the drainage channel.

"The sanitary district was created by an act of the general assembly of Illinois, and the only authority of the State having any control or supervision over the channel is that corporation. Any other control or supervision lies with the lawmaking power of the State of Illinois, and I cannot suppose that complainant seeks to coerce that. It is difficult to conceive what decree could be entered in this case which could bind the State of Illinois or control its action.

"The governor, it is true, was empowered by the act to authorize the water to be let into the channel on the receipt of a certificate, by commissioners appointed by him to inspect the work, that the channel was of the capacity and character required. This was done, and the water was let in on the day when the application was made to this court for leave to file the bill. The governor had discharged his duty, and no official act of Illinois, as such, remained to be performed.

"Assuming that a bill could be maintained against the sanitary district in a proper case, I cannot agree that the State of Illinois would be a necessary or proper party, or that this bill can be maintained against the corporation as the case stands.

"The act complained of is not a nuisance *per se*, and the injury alleged to be threatened is contingent. As the channel has been in operation for a year, it is probable that the supposed basis of complaint can now be tested. But it does not follow that the bill in its present shape should be retained.

"In my opinion both the demurrers should be sustained, and the bill dismissed, without prejudice to a further application, as against the sanitary district, if authorized by the state of Missouri."

[24] 185 U. S. 125; 22 Sup. Ct. Rep. 552; 46 L. ed. 838.

held that the controversy was one between the States of which the Supreme Court could take original jurisdiction.

After a review of the authorities, the court show that the interests involved are substantial ones, ones which, as between sovereign States, would furnish sufficient ground for controversy, and that, therefore, the individual States being unable to deal with one another, either by diplomatic negotiation, treaty, or war, the General Government must have the right to intervene. The opinion declares:

"The action complained of is state action, and not the action of state officers in abuse or excess of their powers.

"The State of Colorado contends that, as a sovereign and independent State, she is justified, if her geographical situation and material welfare demand it in her judgment, in consuming for beneficial purposes all the waters within her boundaries; and that, as the sources of the Arkansas river are in Colorado, she may absolutely and wholly deprive Kansas and her citizens of any use of or share in the waters of that river. She says that she occupies toward the State of Kansas the same position that foreign States occupy toward each other, although she admits that the Constitution does not contemplate that controversies between members of the United States may be settled by reprisal or force of arms, and that to secure the orderly adjustment of such differences power was lodged in this court to hear and determine them. The rule of decision, however, it is contended, is the rule which controls foreign and independent States in their relations to each other; that by the law of nations the primary and absolute right of a State is self-preservation; that the improvement of her revenues, arts, agriculture, and commerce are incontrovertible rights of sovereignty; that she has dominion over all things within her territory, including all bodies of water, standing or running, within her boundary lines; that the moral obligations of a State to observe the demands of comity cannot be made the subject of controversy between states; and that only those controversies are

justiciable in this court which, prior to the Union, would have been just cause for reprisal by the complaining State; and that, according to international law, reprisal can only be made when a positive wrong has been inflicted or rights *stricti juris* withheld.

"But when one of our States complains of the infliction of such wrong or the deprivation of such rights by another State, how shall the existence of cause of complaint be ascertained, and be accommodated if well founded? The States of the Union cannot make war upon each other. They cannot 'grant letters of marque and reprisal.' They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations, and make treaties.

"As Mr. Justice Baldwin remarked in Rhode Island v. Massachusetts: 'Bound hand and foot by the prohibitions of the Constitution, a complaining State can neither treat, agree, or fight with its adversary, without the consent of Congress. A resort to the judicial power is the only means left for legally adjusting or persuading a State which has possession of disputed territory to enter into an agreement or compact relating to a controverted boundary. Few, if any, will be made when it is left to the pleasure of the State in possession; but when it is known that some tribunal can decide on the right, it is most probable that controversies will be settled by compact.' 12 Pet. 657; 9 L. ed. 1233. . . ."[25]

The demurrer to the bill, alleging want of jurisdiction, was, therefore, overruled, without prejudice to any question, and leave to answer granted.

Coming before the Supreme Court again upon its merits,[26] the United States, on leave, filed a petition of intervention, asserting that the amount of the flow of water of the river in question was subject to federal authority and control, as incidental to its duty

[25] For a discussion of the legal points involved in this case see *Journal of Political Economy*, XI, 273, article, "The Present Status of Rights to Interstate Streams;" and *Columbia Law Review*, II, 364, article, "Notes on Suits Between States."

[26] Kansas v. Colorado, 206 U. S. 46; 27 Sup. Ct. Rep. 655; 51 L. ed. 956.

of legislating for the reclamation of its arid lands owned by it. This claim the court refused to recognize.[27]

As regards the jurisdiction of the court, the opinion declares that, generally speaking, "when the judicial power of the United States was vested in the Supreme and other courts, all the judicial power which the nation was capable of exercising was vested in those tribunals; and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties." Section

[27] After reviewing the doctrines that had been put forward by counsel for the United States, that "all powers which are national in their scope must be vested in the Congress of the United States," the court declare:

"At the time of the adoption of the Constitution, within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the State in which any particular tract of such land was to be found; and the Constitution, therefore, makes no provision for a national control of the arid regions or their reclamation. But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the National Government. But, if no such power has been granted, none can be exercised. It does not follow from this that the National Government is entirely powerless in respect to this matter. These arid lands are largely within the territories, and over them, by virtue of the second paragraph of section 3 of article IV, heretofore quoted, or by virtue of the power vested in the National Government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution, and, therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found mainly, if not only, in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen; and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving, by irrigation or otherwise, the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation."

2 of Article III providing that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, etc., is declared to be "not a limitation nor an enumeration," but "a definite declaration — a provision that the judicial power shall extend to — that is, shall include — the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power."

This language seems very broad, and the author is not sure how comprehensive a doctrine is intended to be declared. It would seem, however, that the position is taken, that the Federal Government is equipped with judicial power extending wherever persons or property can be reached by the processes of its courts. It would appear, therefore, that the court based its jurisdiction not so much on the clause of the Constitution specifically extending its jurisdiction to controversies between two or more States, as on the general statement in Section 1 of Article III that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." "By this," the court declare, "is granted the entire judicial power of the nation." [28]

Having held that the original jurisdiction of the Supreme Court extends to the controversy at issue between the States of Kansas and Colorado, the court turns to a consideration of the merits of that controversy and to the law applicable thereto. As to the law to be applied the court held itself to be bound by the law of neither State, but that, as it had been declared in the case when upon demurrer, "sitting, as it were, as an international, as well as a domestic tribunal, we apply federal law, state law, and international law, as the exigencies of the particular case may demand." In short, in all cases where the common law of the States is not in agreement or adequate, the Supreme Court asserts its right to apply principles, drawn either from federal or interna-

[28] See, *contra*, Cohen v. Virginia, 6 Wh. 264; 5 L. ed. 257; Martin v. Hunter's Lessee, 1 Wh. 304; 4 L. ed. 97; Robertson v. Baldwin, 165 U. S. 275; 17 Sup. Ct. Rep. 326; 41 L. ed. 715.

tional law, and thus to build up what may properly be termed an interstate common law.[29]

§ 606. Justiciable Quasi-Sovereign Rights of the States.

The case of Georgia v. Tennessee Copper Co.,[30] though not one between States, illustrates a further definition by the Supreme Court of what will constitute a justiciable interest upon the part of a State enabling it to seek relief by federal judicial process. Here an injunction was granted, at the suit of the State of Georgia, to enjoin the defendant company located in the State of Tennessee from discharging noxious gases from its works over the border of the State upon the territory of the plaintiff. In its opinion the court observe that it is proper to grant relief to a State, as a quasi-sovereign body, under circumstances which would not warrant it in a suit between private persons. In the case at bar, the court say: "The very elements that would be relied upon in a suit between fellow citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it, capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. . . . The caution with which demands of this sort, on the part of a State, for relief from injuries analogous to torts, must be examined, is dwelt upon in Missouri v. Illinois, 200 U. S. 496; 26 Sup. Ct. Rep. 268; 50 L. ed. 572. But it is plain that some such demands must be recognized if the grounds alleged are proved. When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court." The

[29] *Cf. Harvard Law Review*, XXI, 132. See also Georgia v. Tennessee Copper Co., 206 U. S. 230, 27 Sup. Ct. Rep. 618; 51 L. ed. 1038.

[30] 206 U. S. 230; 27 Sup. Ct. Rep. 618; 51 L. ed. 1038.

court, in its opinion, then goes on to make the following important observation: "Some peculiarities necessarily mark a suit of this kind. If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice, it may insist that an infraction of them shall be stopped. The States by entering the Union, did not sink to the position of private owners, subject to one system of private law."

§ 607. New Hampshire v. Louisiana and South Dakota v. North Carolina.

The interesting cases of New Hampshire v. Louisiana[31] and South Dakota v. North Carolina[32] will receive consideration in the chapter entitled The Suability of the States.

§ 608. Suits of States Against Individuals.

The question as to the character of interests requisite for the institution and maintenance of suits by the States of the Union has necessarily to be considered as well when individuals have been proceeded against as when States have been the parties defendant. The case of Georgia v. Tennessee Copper Co.[33] has been spoken of in the preceding paragraphs. A few other cases will sufficiently indicate the character and extent of this branch of the federal judicial power.

In Pennsylvania v. Wheeling & B. Bridge Co.[34] upon suit of the plaintiff State the defendant was, by decree, ordered to remove or elevate a bridge which, under color of a Virginia statute, it was constructing, on the ground that it obstructed navigation to and from the ports of Pennsylvania, and that the State, as a State, was interested directly in having the obstruction removed.[35]

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[31] 108 U. S. 76; 2 Sup. Ct. Rep. 176; 27 L. ed. 656.
[32] 192 U. S. 286; 24 Sup. Ct. Rep. 269; 48 L. ed. 448.
[33] 206 U. S. 230; 27 Sup. Ct. Rep. 618; 51 L. ed. 1038.
[34] 13 How. 518; 14 L. ed. 249.
[35] Chief Justice Taney and Justice Daniel dissenting.

In Wisconsin v. Duluth[36] suit was brought to enjoin the city of Duluth from maintaining a canal which drained water from the St. Louis river, and thus injured that stream as a channel of navigation to the detriment of the interests of the citizens of the plaintiff State. The court, however, found the United States had, as a matter of fact, assumed possession and control of the canal, and that this being so, the State of Wisconsin could not complain or be granted relief.

In Wisconsin v. Pelican Insurance Co.[37] was raised the very important question as to the right of a State to sue citizens or corporations of other States to recover pecuniary penalties imposed by the criminal law of the plaintiff State.

This was an action brought upon a judgment recovered by the State of Wisconsin in one of her own courts against the Pelican Insurance Co., a Louisiana corporation, for penalties imposed by a statute of Wisconsin for not making returns to the insurance commissioner of the State as required by statute. The jurisdictional point was raised by the defendant that the judicial power of the United States, and the original jurisdiction of the Supreme Court did not extend to suits, prosecuted by a State, which, on the settled principles of public and international law, could not be entertained by the judiciary of another State, and that it was one of these settled principles of law that the courts of one country or State will not execute the penal laws of another. The Supreme Court sustained the point. After a review of authorities showing that the only cases in which the courts of the United States had entertained suits by a foreign State, were to enforce demands of a civil nature,[38] the opinion declares: "Notwithstanding the comprehensive words of the Constitution, the mere fact that a State is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another State or her citizens. . . . This court

[36] 96 U. S. 379; 24 L. ed. 668.

[37] 127 U. S. 265; 8 Sup. Ct. Rep. 1370; 32 L. ed. 239.

[38] The Sapphire, 11 Wall. 164; 20 L. ed. 127; King of Spain v. Oliver, 2 Wash. 429.

has declined to take jurisdiction of suits between States to compel the performance of obligations which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their governments.[39] . . . The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties. . . . The application of the rule to the courts of the several States and of the United States is not affected by the provision of the Constitution and of the Act of Congress, by which the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law or usage in the State in which they were rendered."

In Mississippi v. Johnson[40] and Georgia v. Stanton[41] the Supreme Court refused to grant injunctions restraining the defendants from executing in the course of their official duties, an act of Congress which was alleged unconstitutionally to affect the political rights of the State. The political rights, rights of sovereignty, the court held were not subjects within the power of the judiciary to determine and protect.

In Texas v. White[42] proprietary rights of the State were involved, and jurisdiction was assumed by the court and relief granted. So also, in Craig v. Missouri,[43] Florida v. Anderson,[44] and Alabama v. Burr[45] proprietary rights were involved, and jurisdiction exercised.

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[39] Citing (*inter alia*) Kentucky v. Dennison (24 How. 66; 16 L. ed. 717), in which was refused a mandamus to the governor of Kentucky to compel him to surrender a fugitive from justice.

[40] 4 Wall. 475; 18 L. ed. 437.

[41] 6 Wall. 50; 18 L. ed. 721.

[42] 7 Wall. 700; 19 L. ed. 227.

[43] 4 Pet. 410; 7 L. ed. 903.

[44] 91 U. S. 667; 23 L. ed. 290.

[45] 115 U. S. 413; 6 Sup. Ct. Rep. 81; 29 L. ed. 435.

§ 609. Suits Between the United States and a State of the Union.

Article III does not in express terms grant jurisdiction in suits between a State and the United States, but in a number of instances suits brought by the United States against individual States of the Union have been entertained and decided by the Supreme Court.

In United States v. North Carolina[46] an action of debt upon certain bonds issued by the defendant State was tried and determined upon its merits, judgment being rendered in favor of the defendant. No question of jurisdiction is discussed in the briefs of counsel or in the opinion of the court. In a later case, however, it was declared that "it did not escape the attention of the court, and the judgment would not have been rendered, except upon the theory, that this court has original jurisdiction of a suit brought by the United States against a State."[47]

In United States v. Texas[48] the United States again appeared as plaintiff in a suit against a State, this time with reference to a matter of boundary. Here the question of jurisdiction was raised and carefully considered. After calling attention to the fact that if a dispute as to boundary or other matters is not determinable in the Supreme Court, it is not determinable anywhere, and its settlement in case of continued disagreement must be by physical force, Justice Harlan, who delivered the opinion of the court, continued: "We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the General Government. They could not have overlooked the possibility that controversies capable of judicial solution might arise between the United

[46] 136 U. S. 211; 10 Sup. Ct. Rep. 920; 34 L. ed. 336.

[47] United States v. Texas, 143 U. S. 621; 12 Sup. Ct. Rep. 488; 36 L. ed. 285. *Cf. Columbia Law Review*, II, 283, 364, "Notes on Suits Between States," by Carmen F. Randolph.

[48] 143 U. S. 621; 12 Sup. Ct. Rep. 488; 36 L. ed. 285.

States and some of the States, and that the permanence of the Union might be endangered if in some tribunal was not intrusted the power to determine them according to the recognized principles of law. But in what tribunal could a trust so momentous, in more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquility, have constituted with authority to speak for all the people and all the State, upon questions before it to which the judicial power of the Nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State."

Only since 1902 may it be said to have been certainly determined that the Supreme Court will assume jurisdiction in suits brought by a State of the Union against the United States.

In Chisholm v. Georgia, Chief Justice Jay had indicated, *obiter*, that such a suit would not be entertained for the reason that the court would be without power to enforce its orders should judgment be rendered against the defendant. In Florida v. Georgia,[49] however, the United States was allowed by the court to intervene in a suit between two States, but without becoming one of the parties to the record. And in Mississippi v. Johnson[50] it was intimated that in a proper suit a bill might be filed by a State against the United States. Finally, in Minnesota v. Hitchcock,[51] decided in 1902, jurisdiction was squarely asserted. In that case it was held that a suit by a State to enjoin the Secretary of the Interior of the United States from selling certain Indian lands, was a suit against the United States. "The legal title to these lands," said the court, "is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the

[49] 11 How. 298; 13 L. ed. 702.
[50] 4 Wall. 475; 18 L. ed. 437.
[51] 185 U. S. 373; 22 Sup. Ct. Rep. 650; 46 L. ed. 954.

Government of its title, and vest it in the State. The United States is therefore the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter." By statute the United States had consented to be sued in matters relating to these Indian lands. Jurisdiction was assumed by the court, and the case decided upon its merits. "This is a controversy," said the court, "to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is of course, under that clause [extending jurisdiction over controversies 'to which the United States shall be a party'] a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant."

In this case counsel on neither side raised the question of the original jurisdiction of the court, being anxious, it would appear, that the case should be decided on its merits. This silence, however, Justice Brewer, who rendered the opinion of the court, declared was not sufficient in itself to give to the court such jurisdiction or to excuse the court from satisfying itself upon the point. "The silence of counsel," said Justice Brewer, "does not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws. It is the duty of every court of its own motion to inquire into the matter. . . . Consent may waive an objection so far as respects the person, but it cannot invest the court with a jurisdiction which it does not by law possess over the subject-matter."

§ 610. Suits Between a State and Foreign States or Their Citizens.

As regards controversies "between a State, . . . and foreign States, citizens, or subjects," it may be said that no such suits

have ever been brought, and one can, therefore, only speculate as to the extent of federal judical power under this clause. We do know, however, by judicial determination, that neither a "Territory;"[52] an Indian tribe;[53] nor the District of Columbia[54] is a "State" within the meaning of the word as used in this clause of the Constitution.

Whether or not, if a suit were brought by a foreign State, it would be entertained by the Supreme Court, is very doubtful. A foreign State could not, of course, be compelled to appear as a party defendant in such a suit, and reason would, therefore, seem to suggest that it should not be permitted to appear as a party plaintiff unless, of course, the defendant State should give its consent. Madison took this view. "I do not conceive," he said, "that any controversy can ever be decided in these courts between an American State and a foreign State, without the consent of the parties. If they consent, provision is here made." [55] Story, in his *Commentaries,* takes the same view.[56] On the other hand, we have in the opinion of the Supreme Court rendered in the case of Hans v. Louisiana[57] a *dictum* approving the dissenting opinion of Justice Iredell in Chisholm v. Georgia, according to which it was declared not to have been the intention of the framers of the Constitution to create any new remedies unknown to the law. From this it would follow that the Supreme Court could not take jurisdiction of a case between a foreign State and a State of the Union, even with the consent of both parties.[58]

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52 Smith v. United States, 1 Wash. Ter. 269.

53 Cherokee Nation v. Georgia, 5 Pet. 1; 8 L. ed. 25.

54 Hepburn v. Ellzey, 2 Cr. 445; 2 L. ed. 332.

55 *Elliot's Debates,* II, 391..

56 § 1699.

57 134 U. S. 1; 10 Sup. Ct. Rep. 504; 33 L. ed. 842.

58 Upon this point see article by Carmen F. Randolph in *Columbia Law Review,* II (1902), p. 283, entitled "Notes on Suits Between States."

CHAPTER LIV.

THE SUABILITY OF STATES.

§ 611. A Sovereign State May not Be Sued Without Its Consent.

That a sovereign is not subject to suit, without its consent, is a principle that has come down unchallenged since the time of Rome. It has found expression in the rule that "the sovereign can do no wrong" and has been adopted by the English Common Law as fully as, indeed, if anything, more fully than by the systems of jurisprudence founded upon the Civil Law.[1]

In Civil Law countries the State is often held liable in actions based upon the torts of its agents as well as in those of a contractural nature; whereas, in the United States, the individual whose rights have been violated by persons acting under State authority has no remedy against the State, except by express permission, and this permission has never been granted except with reference to contract claims.[1] The injured individual has, however, right of action against the public officials by whose illegal acts he has been wronged, but these officials may be financially irresponsible, and thus the remedy, in fact, be of no value.

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[1] Where, however, provision has been made by a State for suits against itself based upon claims arising out of contract, the American courts have sometimes held that the taking of private property by a public official for the benefit of the State creates an implied contract for compensation, and have thereupon awarded damages. Thus in United States v. Great Falls Manufacturing Co. (112 U. S. 645; 5 Sup. Ct. Rep. 306; 28 L. ed. 846), the Supreme Court of the United States said: "We are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, is under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims, of actions founded upon any contract, express or implied, with the Government of the United States."

Though the principle that the King can do no wrong is, as Blackstone says, "a necessary and fundamental principle of the English Constitution," the English subject aggrieved by his sovereign, is in fact granted redress by the use of either the "petition of right" or of the "*monstrans de droit.*" The first remedy, dating from the time of Edward I, lies where the government is in full possession of hereditaments or chattels to which the claimant lays title. Upon this petition the King, as a matter of course, indorses *soit droit fait al partie,* whereupon the matter is determined upon issue or demurrer as in a suit between private individuals. The *monstrans de droit* was originally employed only in cases where the right of both the King and the subject appears upon record.

Though, according to English constitutional law, the King is not subject to suit civilly or criminally, all of his agents, from the highest to the lowest, are. For any act not warranted by law that they may commit they are responsible in the ordinary courts of law to private citizens injured by them, and they may not plead the command of the crown in justification of an act otherwise illegal.

In America the same principle of official responsibility applies, with, however, these exceptions. In the first place, we have no chief executive who is exempt from responsibility to law. In the second place our legislatures, federal and state, have limited legislative powers, especially as to the taking of life, liberty, and property without due process of law. Thus in England an official can justify, in all cases, if he can show an authority derived from an act of Parliament; in the United States, however, he must be able to point to a legislative act which can be shown to be in conformity with the conditions imposed by our written constitutions. In other respects, however, our citizens are not so favorably situated as regards claims against the State as they are in England, for the two remedies, the *Petition of Right* and the *Monstrans de droit,* have not found a place in our jurisprudence. In some classes of

cases, as we shall see, the United States, and several of the States here made provision for suits against themselves. But in all other cases, the citizen, though he may hold the public officials to a strict legal responsibility, is without the right to sue the State, the principle being unreservedly accepted that the sovereignty of the State implies freedom from suit against its will.[2]

§ 612. Chisholm v. Georgia.

Hamilton's and Marshall's position that, under the new Constitution, the States of the Union would not be held amenable to suits brought by citizens of other States soon proved erroneous. In the case of Chisholm v. Georgia,[3] decided in 1793, it was held that, under the terms of the federal Constitution, which provided that the judicial power of the Federal Government should extend to all cases "between a State and citizens of another State," a State might be made party defendant in a suit brought by a citizen of another State.[4] The non-suability of a State apart from specific

[2] In *The Federalist* (No. LXXXI) Hamilton declares: "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind." Hamilton then goes on to argue that the States would continue to enjoy this exemption under the Constitution the adoption of which he was arguing. "The exemption," he says, "as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the Constitution, it will remain with the States and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of state sovereignty were discussed in considering the article of taxation, and need not be repealed here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the state governments would by the adoption of the plan, be divested of the privilege of paying their own debts in their own way, free from every constraint, but that which flows from the obligation of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will." Marshall and Madison in the Virginia convention that ratified the new Constitution denied that it gave to the federal courts jurisdiction of suits that might be brought against a State by a citizen of another State (*Eliot's Debates*, III, 533, 555).

[3] 2 Dall. 419; 1 L. ed. 440.

[4] In the case of Georgia v. Brailsford (2 Dall. 402; 1 L. ed. 433), it had already been held that a State might appear as party plaintiff in a suit against a citizen of another State.

constitutional provision to the contrary was not passed upon. The only question was whether, considering the general political doctrines prevailing at the time of the adoption of the Constitution, the framers of that instrument could properly be held to have intended, by the use of the words "between a State and citizens of another State," that this derogation from the sovereignty of the States should exist. Justice Iredell argued that, under the Constitution, the federal courts could take jurisdiction only in those cases in which a State could, according to generally accepted principles of law, be properly made a party, namely, where it appeared as plaintiff, or consented to appear as defendant. Justices Blair, Cushing, and Wilson, and Chief Justice Jay, however, held that not only did the words of the Constitution include all cases in which a State was a party, whether plaintiff or defendant, but that there was nothing in the status of the States under the Constitution that would negative this literal interpretation of the grant of federal judicial power.

§ 613. The Eleventh Amendment.

The popular objection to this decision immediately aroused and manifested in the adoption of the Eleventh Amendment is a matter of familiar history. The phraseology that the judicial power of the United States "shall not be construed to extend," instead simply that it "shall not extend" to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State, was employed in order to give to the Amendment a retroactive effect, and thus defeat suits similar to that of Chisholm against Georgia, already pending. And thus when the first of these pending cases came before the Supreme Court,[5] it declared, in a unanimous opinion, that all these cases should be dismissed because of want of jurisdiction.

It will be observed that the Eleventh Amendment does not in terms declare that the judicial power of the United States shall

[5] Hollingsworth v. Virginia, 3 Dall. 378; 1 L. ed. 644.

not be construed to extend to suits brought against a State by its own citizens. Nor is there anywhere in the Constitution a declaration that the United States itself shall not be sued by one of its own citizens. The Supreme Court has, however, held that, in the absence of an express grant of jurisdiction, such suits are, by the generally accepted principles of public law, beyond the jurisdiction of the courts. Indeed, in the case of Hans v. Louisiana[6] the court held that the decision in Chisholm v. Georgia had been an erroneous one in holding that a State could be sued by other than its own citizens. After referring to the views of Madison and Marshall, expressed in the Virginia convention, and of Hamilton in *The Federalist,* and the reception met by the decision in Chisholm v. Georgia, the court declared: "It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that [Chisholm v. Georgia] then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. . . . The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. . . . The suability of a State without its consent was a thing unknown to the law. . . . It was fully shown in an exhaustive examination of the old law by Mr. Justice Iredell in his [dissenting] opinion in Chisholm v. Georgia; and it has been conceded in every case since, where the question has in any way been presented."

In New Hampshire v. Louisiana[7] the Supreme Court refused to countenance the attempt of citizens to evade the operation of the Eleventh Amendment by transferring their pecuniary claims to another State and having that State bring suit in their behalf.

[6] 134 U. S. 1; 10 Sup. Ct. Rep. 504; 33 L. ed. 842.

[7] 108 U. S. 76; 2 Sup. Ct. Rep. 176; 27 L. ed. 656.

In this case the court found that in fact the original owners of the bonds and coupons in question still remained the real parties of interest, though not the nominal parties of record, and that, therefore, the suit was not a *bona fide* one between States. The court said: "The evident purpose of the Amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and, in our opinion, one State cannot create a controversy with another State within the meaning of that term of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens."

§ 614. South Dakota v. North Carolina.

In the case of South Dakota v. North Carolina,[8] however, the true party of interest was shown to be the plaintiff State. Jurisdiction was assumed by the Supreme Court and a judgment and decree awarded against the defendant State. The facts of this important case were these:

In 1849 the State of North Carolina chartered a railroad and subscribed for twenty thousand shares of stock of one hundred dollars each. At the same time an issue of bonds was provided for and these shares of stock, thus held by the State, pledged for their payment. These bonds ran for thirty years and became due in 1897. In 1879, however, the State had compromised its debt, including all except about $250,000 of these bonds. In 1901 the owner of several of these unpaid bonds gave ten of them outright to the State of South Dakota, which State by legislative act authorized the acceptance of them and the institution of suit upon them and the employment for this purpose, by the attorney-general, of special counsel who should "be entitled to reasonable compensation out of the recoveries and collections in such suits and actions." Whereupon original suit in the Supreme Court of the United States against the State of North Carolina was instituted. The Supreme Court, by a bare majority of five justices to four,

[8] 192 U. S. 286; 24 Sup. Ct. Rep. 269; 48 L. ed. 448.

assumed jurisdiction, gave judgment for the plaintiff, and ordered, in default of payment of the amount decreed, the sale at public auction of one hundred shares of the railroad stock owned by the State.[9]

Justice Brewer delivered the opinion of the court. After calling attention to the fact that the validity of the bonds and mortgages was not in doubt, Justice Brewer argued that the case did not come within the doctrine of New Hampshire v. Louisiana,[10] for the reason that the bonds had been assigned absolutely to the State of South Dakota, and that a recovery upon them would inure to the benefit of that State. The motive which had dictated the assignment of the bonds in question to the State could not, the justice argued, affect the validity of the gift or the jurisdiction of the court. In support of this point was cited McDonald v. Smalley,[11] in which it was held that federal jurisdiction was not affected because the title to the property in question had been conveyed to the plaintiff in the belief that it would be sustained in the federal and would not be in the state courts, and Cheever v. Wilson[12] and other cases in which it was held that if a person take up a *bona fide* residence in another State, he may sue in a federal court, notwithstanding that his purpose in so doing is that he may resort to the federal courts in cases in which he would have no standing as a resident of the State in which the federal courts are held.

The question to be decided in South Dakota v. North Carolina was thus reduced to whether, because of the simple fact that the the defendant was a State, the court was without jurisdiction. That this question should be answered in the negative, Justice Brewer showed by a review of cases in which it appeared that

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[9] The amount was later paid by North Carolina, and thus the forced sale of its stock made not necessary.

[10] 108 U. S. 76; 2 Sup. Ct. Rep. 176; 27 L. ed. 656.

[11] 1 Pet. 620; 7 L. ed. 287.

[12] 9 Wall. 108; 19 L. ed. 604.

from the beginning suits instituted by one State against another involving property rights had been entertained and decided.[13]

That which differentiated this case, however, from the cases previously decided was the fact that it was not one for the recovery of a specific piece of property, but for a money judgment upon a debt. To the objection that the court should not exercise jurisdiction for the reason that it would not be able to enforce such a judgment, when rendered, by the sale of public property,[14] or by the levy of a tax,[15] Justice Brewer said that in the case at bar, at least as it was then before the court, it would not have to meet this difficulty for the reason that a sale of the stock mortgaged for the payment of the bonds might produce sufficient to satisfy the plaintiff's claim. "If that should be the result," he said, "there would be no necessity for a personal judgment against the State. . . . Equity is satisfied by a decree for a foreclosure and sale of the mortgaged property, leaving the question of a judgment over for any deficiency to be determined when, if ever, it arises. And surely, if, as we have often held, this court has jurisdiction of an action by one State against another to recover a tract of land, there would seem to be no doubt of the jurisdiction of one to enforce the delivery of personal property."

The dissenting opinion, concurred in by four justices, rested in the main upon the argument that the spirit of the Eleventh Amendment prohibited such a suit, and that it should not be violated by the device of transferring the debt from private hands to a State. In support of the position that the spirit and not the strict letter of the Amendment should be followed, the dissenting

[13] Approving reference was also made to the declaration of Marshall in Cohens v. Virginia (6 Wh. 264; 5 L. ed. 257), that the adoption of the Eleventh Amendment had been due not so much to a wish to maintain the sovereignty of the State from the degradation supposed to attend a compulsory appearance before a federal tribunal as to the desire to avoid anticipated suits for the collection of certain debts then existing.

[14] Meriwether v. Garrett, 102 U. S. 472; 26 L. ed. 197.

[15] Rees v. Watertown, 19 Wall. 107; 22 L. ed. 72.

opinion cited the cases of New Hampshire v. Louisiana,[16] Hans v. Louisiana,[17] and Smith v. Reeves.[18]

In the first of these cases, argued the opinion, it was conceded that, but for the fact that the defendant was a State, the title of the plaintiff would have supported a cause of action, and that, therefore, it had been the spirit rather than the letter of the Eleventh Amendment which had governed the court in refusing jurisdiction. In Hans v. Louisiana the suit was clearly not forbidden by the letter of the Eleventh Amendment, for it was one not between a State and a citizen of another State, but between a State and one of its own citizens. Yet the court held that the general policy laid down by the Amendment forbade its prosecution. In Smith v. Reeves, controlled by the spirit of the Eleventh Amendment, the court refused to permit a State to be sued by a federal corporation which claimed that, in virtue of the law of its creation, it had the right to invoke the jurisdiction of the federal courts even in a suit against a State, the Eleventh Amendment to the contrary notwithstanding. In denying this claim the court, applying the spirit rather than the letter of the Amendment, said: "It could never have been intended to exclude from federal judicial power suits arising under the Constitution or laws of the United States when brought against a State by private individuals or state corporations, and at the same time extend such power to suits of like character brought by federal corporations against a State without its consent." So also, it was pointed out, that in United States v. North Carolina[19] and in United States v. Texas[20] the spirit, rather than the letter of the Constitution, was followed in holding that, though not specifically granted the power, the Supreme Court might entertain a suit brought by the United States against one of the individual States of the Union. To entertain jurisdiction in the present case was, indeed, the dissenting

[16] 108 U. S. 76; 2 Sup. Ct. Rep. 176; 27 L. ed. 656.
[17] 134 U. S. 1; 10 Sup. Ct. Rep. 504; 33 L. ed. 842.
[18] 178 U. S. 436; 20 Sup. Ct. Rep. 919; 44 L. ed. 1140.
[19] 136 U. S. 211; 10 Sup. Ct. Rep. 920; 34 L. ed. 336.
[20] 143 U. S. 621; 12 Sup. Ct. Rep. 488; 36 L. ed. 285.

justices pointed out, to render justiciable claims that were not even within the reach of the ruling of Chisholm v. Georgia, for it would permit the assignment to and collection by another State of claims held by citizens against their own States. Indeed, the opinion argued, the logical effect of the decree concurred in by the majority of the court, would be, in the light of the jurisdiction of the Supreme Court as upheld in United States v. North Carolina and United States v. Texas, to render the United States suable for any claim against it which private individuals might transfer to a State.

Still further, it was argued in the dissenting opinion, that, independently of the foregoing objections, the claim of South Dakota should have been refused recognition for the reason that it was based upon an assignment of a debt, which did not constitute, and never had constituted a justiciable obligation against the State of North Carolina, and that, therefore, South Dakota as assignee should not be held to have received any legal right which the assignor himself had not had. In support of this contention, reference was made to United States v. Buford,[21] in which it was held that a claim, barred by the statute of limitations, would not be made enforceable by assignment to the United States, against which, ordinarily, the statute does not run. Finally, upon mere grounds of equity, it was argued that the suit of South Dakota should have been dismissed, as it was apparent that the whole proceeding was but a part of a scheme to evade a constitutional provision.[22]

§ 615. Eleventh Amendment Does not Apply to Suits Instituted by a State: Cohens v. Virginia.

In the great case of Cohens v. Virginia[23] the question arose whether the Supreme Court of the United States might exercise jurisdiction in cases appealed to it from the highest court of a

[21] 3 Pet. 12; 7 L. ed. 585.

[22] Other objections to the decree of the court were raised in the dissenting opinion, which, however, do not need to be considered at this place.

[23] 6 Wh. 264; 5 L. ed. 257.

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[22] Other objections to the decree of the court were raised in the dissenting opinion, which, however, do not need to be considered at this place.

[23] 6 Wh. 264; 5 L. ed. 257.

State, in cases in which the State had obtained a judgment, civil or criminal, against a citizen, but in doing so had overruled a federal right, privilege, or immunity set up by that citizen. Upon the part of Virginia it was argued that not only did the grant by the Constitution of judicial power to the United States not contemplate a right to revise the decisions of state courts in which a State was a party (as in the case at bar, in which, being a criminal case, the State appeared as the original plaintiff), but that to exercise the right to reverse a judgment obtained in its favor in its courts would be, in effect, to entertain a suit against itself.

The facts upon which this case was founded were these: Congress had authorized the establishment of a lottery by the corporation of the city of Washington in the District of Columbia. Virginia had passed a law forbidding the sale, within its limits, of lottery tickets. Cohens was arrested for selling in Virginia lottery tickets of the Washington lottery, and in defense set up the law of Congress.[24] This defense was overruled, Cohens was convicted, and his conviction affirmed in the highest court of Virginia. Thereupon, by writ of error, he appealed to the Supreme Court of the United States under the authority of the twenty-fifth section of the Judiciary Act.

Chief Justice Marshall rendered the unanimous opinion of the court. After calling attention to the clause of the federal Constitution which gives to the federal judiciary jurisdiction in all cases, in law and equity, arising under the Constitution, laws, and treaties of the United States, it is pointed out that upon those who would make exceptions to this general grant of power must fall the burden of proof. In fact, as Marshall goes on to declare, to grant the contention set up by Virginia would be to defeat the very ends for the attainment of which the Constitution was adopted. If granted, he says, "what power of the [Federal] Government could be executed by its own means, in any State disposed

[24] As to the power of Congress as decided in this case, when acting as the legislature for the District of Columbia to authorize acts beyond its limits, see *post*, section 162.

to resist its execution by a course of legislation? The laws must be executed by individuals acting within the several States. If these individuals may be exposed to penalties, and if the courts of the Union cannot correct the judgments by which these penalties may be enforced, the course of the government may be, at any time arrested by the will of the one of its members. Each member will possess a veto on the will of the whole." Concluding his argument upon this point, Marshall says: "After bestowing on this subject the most attentive consideration, the court can perceive no reason founded on the character of the parties for introducing an exception which the Constitution has not made, and we think that the judicial power, as originally given, extends to all cases arising under the Constitution or a law of the United States, whoever may be the parties."

The State of Virginia had, however, as we have said, still another argument which had to be overcome. Granting, counsel said, that the case be construed to come within the federal judicial power as originally granted by the Constitution, it has nevertheless been withdrawn from that power since the adoption of the Eleventh Amendment. To this argument, Marshall replied that the Amendment was not intended to cover cases in which a State might be defendant in error, but only those originally instituted against her by an individual. By that amendment the judicial power is not to extend to any suit "commenced or prosecuted" against a State by citizens of another State. "To commence a suit," says Marshall, "is to demand something by the institution of a process in a court of justice, and to prosecute the suit is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a State, we should understand the process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the actor is still the same. . . . If a suit brought in one court, and carried by legal process to a supervising court,

be a continuation of the same suit, then this suit [at bar] is not commenced nor prosecuted against a State. It is clearly in its commencement the suit of a State against an individual, which suit is transferred to this court, not for the purpose of asserting any claim against the State, but for the purpose of asserting a constitutional defense against a claim made by a State."

§ 616. Corporations Chartered by, and of Which the State is a Stockholder, May Be Sued.

In Bank of the United States v. The Planters' Bank of Georgia[25] it was held that a suit against a corporation chartered and partly owned by the State was not a suit against the State. "The State does not," said Marshall, "by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it. It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."

The principle laid down in this case was again applied in the cases of Briscoe v. Bank of Kentucky,[26] and Bank of Kentucky v. Wister,[27] although the State in these cases was the exclusive owner of the stock of the bank.

§ 617. Effect of Eleventh Amendment upon Federal Constitutional Rights Guaranteed against State Violation.

In a series of great cases the Supreme Court of the United States has laid down the doctrine that the Eleventh Amendment does not grant to States nor to their agents a power, unrestrain-

[25] 9 Wh. 904; 6 L. ed. 244.
[26] 11 Pet. 257; 9 L. ed. 709.
[27] 2 Pet. 318; 7 L. ed. 437.

[illegible]

[illegible]

[illegible] Suits against State Officers: When Considered Suits against the State.

[illegible] the United States, [illegible] Eleventh Amendment of an individual State of the

[illegible]

Union, by a citizen is not and has not been questioned, the courts have often found great difficulty in determining just when a suit may be said to be against the State itself, and, therefore, beyond their jurisdiction, and when against the officials of the State personally, in which case they have jurisdiction. Because the courts have not been able to lay down any fully satisfactory rule upon this point, it will be necessary to consider *seriatim* the more important cases in which the question has been involved.

There will first be considered the cases in which the claim has been set up, but denied by the court, that the suit on trial is one against the State, and as such beyond the competence of the court to entertain.

§ 619. United States v. Peters.

In the case of United States v. Peters,[29] decided in 1809, a judgment was given against the heirs of the state treasurer of Pennsylvania, for money improperly received and held by him as such treasurer but not actually paid into the state treasury. The State of Pennsylvania among other grounds set up that the judgment, though in form against an individual, was in fact against itself and as such prohibited by the Eleventh Amendment. As to this Chief Justice Marshall, who rendered the unanimous opinion of the court, declared: "The right of a State to assert as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the courts of the United States is not affected by this Amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides that no suit shall be commenced or prosecuted against a State. The State cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, where a State is not necessarily a defendant. . . . It certainly can never be

[29] 5 Cr. 115; 3 L. ed. 53.

alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the court and prevent their looking into the suggestion and examining the validity of the title."

Marshall then goes on to show that in the case at bar the property in question had in fact never been paid over to and thus gone into the possession of the State.

§ 620. Osborn v. Bank of the United States.

In the case of Osborn v. Bank of the United States[30] an injunction was asked of the federal court to restrain the auditor of the State of Ohio from proceeding against the Bank of the United States under a tax law of that State which law, it was alleged, was in violation of the federal Constitution. Among other grounds for resistance to this application it was argued that the actual defendant in interest in the case was the State; that the State was not and could not be made a defendant of record, and that, therefore, its agents might not be restrained. To this Marshall, who rendered the opinion of the court, replied that the direct interest of the State in the suit was admitted, and, also, that under the Eleventh Amendment it could not be made a party of record, but that this did not render the federal court powerless to restrain the State's agents from proceeding under an unconstitutional law against an individual or corporation. In supporting this contention, Marshall, as was his wont, argued not so much from the requirements of technical procedure or from the letter of the Constitution, as from the general character of the government intended to be established and maintained by that instrument, and from the politically inconvenient and destructive results that would follow from an acceptance of the doctrine he was controverting. "A denial of jurisdiction" he said, "forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best established and most essential powers, as well as to whose which may be deemed questionable. It asserts that the

[30] 9 Wh. 738; 6 L. ed. 204.

agents of a State, alleging the authority of a law void in itself, because repugnant to the Constitution, may arrest the execution of any law in the United States. It maintains that, if a State shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government. . . . The person thus obstructed in the performance of his duty may indeed resort to his action for damages, after the infliction of the injury, but cannot avail himself of the preventive justice of the nation to protect him in the performance of his duties."

In the Osborn case the Supreme Court did not permit a State to interfere with the exercise of the functions of a federal agent and shield itself behind the Eleventh Amendment. In succeeding cases the Supreme Court has in similar manner refused to allow the States, through their respective agents, to interfere with the personal and property rights of private individuals. In some cases it has awarded mandamus to compel the performance by state officials of duties legally imposed upon them. In other cases, it has restrained them by writs of injunction from violating private rights under color of authority derived from unconstitutional laws. Thus in Board of Liquidation v. McComb[31] the court said: "A State, without its consent, cannot be sued by an individual, and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such

[31] 92 U. S. 531; 23 L. ed. 623.

cases, the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void."

In a number of cases, however, the Supreme Court has not permitted this principle of the legal responsibility of the agents of a State to countenance what is in actual effect a suit not against them personally, but against them officially as agents of the State, and, therefore, in reality against the States themselves whose officials they are. Nor has the court been willing to command the performance by a state official of other than mere ministerial acts in which no official discretion has been involved.

§ 621. Rule as to States Being Parties of Record.

As a conclusion from his argument in Osborn v. Bank of the United States, Marshall laid down the following rule: "It may, we think, be laid down as a rule that in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against States is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a State by the citizens of another State or by aliens."

The rule thus laid down has not been adhered to. Indeed it had almost immediately to be altered. In Governor of Georgia v. Madrazo[32] it was held that the Eleventh Amendment forbade the prosecution of a suit for money actually in the treasury of the State and mixed with its general funds or property legally in the hands of the governor acting officially as its chief executive. "The claim upon the governor," said Marshall, "is as a governor; he is sued, not by his name, but by his title. The demand made

[32] 1 Pet. 110; 7 L. ed. 73.

upon him is not personally, but officially. . . . In such a case, where the chief magistrate of a State is sued not by his name, but by his style of office and the claim made upon him is entirely in his official character, we think the State itself may be considered as a party on the record." With a consequence, of course, that the jurisdiction of the court is ousted by the Eleventh Amendment.

And thus from time to time the court has refused to follow Marshall's rule, and has now definitely abandoned it. In Pennoyer v. McConnaughy[33] the court declare: "It is the settled doctrine of this court that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, as the court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit." [34]

§ 622. Mandamus to State Officials.

The case of Louisiana v. Jumel[35] is a leading one upon the question as to when the Supreme Court will award a mandamus to compel the performance by a state officer of a duty which, under color of an unconstitutional law, he refuses to perform to the prejudice of the parties plaintiff.

The State of Louisiana in 1874 provided for an issue of bonds, and in the same law provided for the levying and collection of a particular tax to create a sinking fund for their payment. In 1880, however, by a new Constitution, this provision for payment was abolished. Thereupon Jumel, as one of the holders of the bonds, alleging that that part of the new Constitution which had this effect was in violation of the federal Constitution as an impairment of the contract between the State and the holders of its bonds, applied for a mandamus to compel the treasurer of the State to apply the sinking fund that had been created to the pay-

[33] 140 U. S. 1; 11 Sup. Ct. Rep. 699; 35 L. ed. 363.

[34] Citing New Hampshire v. Louisiana, 108 U. S. 76; 2 Sup. Ct. Rep. 176; 27 L. ed. 656; and *In re* Ayers, 123 U. S. 443; 8 Sup. Ct. Rep. 164; 31 L. ed. 216.

[35] 107 U. S. 711; 2 Sup. Ct. Rep. 128; 27 L. ed. 448.

ment of the bonds, and to continue to levy and collect the tax originally provided for. Upon appeal, the Supreme Court of the United States admitted the existence of a valid contract, but denied the relief prayed upon the following grounds:

"The relief asked will require the officers, against whom the process goes, to act contrary to the positive orders of the supreme political power of the State, whose creatures they are and to which they are ultimately responsible in law for what they do. They must use the public money in the Treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared it shall not be done.

"In The Arlington Case — U. S. v. Lee (106 U. S. 196; 1 Sup. Ct. Rep. 240; 27 L. ed. 171) — it was held that the officers of the United States, holding in their official capacity the possession of lands to which the United States had no title, could be required to surrender their possession to the rightful owner even though the United States were not a party to the judgment under which the eviction was to be had. Here, however, the money in question is lawfully the property of the State. It is in the manual possession of an officer of the State. The bondholders never owned it. The most they can claim is that the State ought to use it to pay their coupons, but until so used it is in no sense theirs." [36]

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[36] Justices Field and Harlan rendered dissenting opinions. In his dissent Justice Field argued that the act asked of the Treasurer was a purely ministerial one which the court had repeatedly said might be compelled (Board of Liquidation v. McComb, 92 U. S. 531; 23 L. ed. 623), and denied that there was any necessity that the particular money for the payment of the bonds should have been segregated in the state treasury.

"If," he said, "the new Constitution had never been adopted there could be no question as to the power of the state courts to require that the moneys collected be applied to the payment of the interest. It would not only have been the duty of the Board of Liquidation to thus apply them, but it would have been a felony to have refused to do so. Now, whatever enactment, constitutional or legislative, impairs the obligation of the contract with the bondholders, that is, abrogates or lessens the means of its enforcement, is void.

In Hagood v. Southern[37] the court said: "A broad line of demarcation separates from such cases as the present, in which the decree requires, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the State in its political capacity, those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs under color of authority, unconstitutional and void. Of such actions, for the redress of the wrong, it was said by Mr. Justice Miller in Cunningham v. Macon & Brunswick R. R. Co. (109 U. S. 446; 3 Sup. Ct. Rep. 292; 27 L. ed. 992): 'In these cases he is not sued as or because he is the officer of the government, but as an individual; and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him.'" [38]

Therefore, the new Constitution, as to that contract, is to be treated as though it had never existed. . . . Nor is there any force in the objection that the funds which the complainants and petitioners seek to reach are in the treasury of the State. They are appropriated by the law of 1874 and by the constitutional amendment of that year to the payment of the interest on the consolidated bonds. . . . The ministerial duty only remained with the officer of the State having charge of the fund, whatever it might be, to apply it. . . . Nor is there any weight in the objection that the officers of the State are called upon to enforce the collection of the tax. They are simply called upon to obey the mandates of the law and Constitution of the State. Both levy the tax and designate the amount and the officers to collect it. . . . The State cannot speak through an enactment which controverts the federal Constitution."

[37] 117 U. S. 52; 6 Sup. Ct. Rep. 608; 29 L. ed. 805.

[38] The opinion continues: "Of such cases, that of United States v. Lee, 106 U. S. 196; 1 Sup. Ct. Rep. 240; 27 L. ed. 171), is a conspicuous example, and it was upon this ground that the judgment in Poindexter v. Greenhow (114 U. S. 270; 5 Sup. Ct. Rep. 903; 29 L. ed. 185) was rested. And so the preventive remedies of equity by injunction may be employed in similar cases to anticipate and prevent the threatened wrong, where the injury would be irreparable, and there is no plain and adequate remedy at law, as was the case in Allen v. B. & O. R. R. Co. (114 U. S. 311; 5 Sup. Ct. Rep. 925; 29 L. ed. 200), where many such instances are cited."

In Pennoyer v. McConnaughy[39] is again clearly stated the distinction between those suits brought against state officials which are to be regarded as suits against the State, and those which are not.

"It is well settled," say the court in that case, "that no action can be maintained in any federal court by the citizens of one of the States against a State, without its consent, even though the sole object of such suit be to bring the State within the operation of the constitutional provision which provides that 'no State shall pass any law impairing the obligation of contracts.' This immunity of a State from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the State within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a State, to compel them to do the acts which constitute a performance by it of its contracts, is in effect a suit against a State itself. In the application of this latter principle two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented. The first class is where the suit is brought against the officers of the State, as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts.[40]

"The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or in a proper case where the remedy at law is inade-

[39] 140 U. S. 1; 11 Sup. Ct. Rep. 699; 35 L. ed. 363.

[40] Citing *In re* Ayers, 123 U. S. 443; 8 Sup. Ct. Rep. 164; 31 L. ed. 216; Louisiana v. Jumel, 107 U. S. 711; 2 Sup. Ct. Rep. 128; 27 L. ed. 448; Antoni v. Greenhow, 107 U. S. 769; 2 Sup. Ct. Rep. 91; 27 L. ed. 468; Cunningham v. Macon & B. R. Co., 109 U. S. 446; 3 Sup. Ct. Rep. 292; 27 L. ed. 992; Hagood v. Southern, 117 U. S. 52; 6 Sup. Ct. Rep. 608; 29 L. ed. 805.

quate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not within the meaning of the Eleventh Amendment an action against the State." [41]

In *Re* Tyler[42] and Scott v. Donald[43] the doctrine is again applied that the Eleventh Amendment does not prevent the issuance of writs of injunction to prevent injuries threatened to individuals by officers claiming the authority of an unconstitutional legislative act, or to prevent the granting of mandamus to compel the performance by them of plain legal duties, purely ministerial in character.

In Smith v. Reeves,[44] however, the action was held to be one against the State. In that case an action had been brought against the defendant "as treasurer of the State of California" to repay to the plaintiffs taxes which they had paid, but which, they alleged, had been unconstitutionally levied. In that case the court said: "In the present case the action is not to recover specific moneys in the hands of the state treasurer, nor to compel him to perform a plain ministerial duty. It is to enforce the liability of the State to pay a certain amount on account of the payment of taxes alleged to have been wrongfully exacted by the State from the plaintiffs. Nor is it a suit to enjoin the defendant from doing some positive or affirmative act to the injury of the plaintiffs in their persons or property, but one in effect to compel the State, through its officer, to perform its promise to return to taxpayers such amount as may be adjudged to have been taken from them under an illegal assessment."

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[41] Citing Osborn v. Bank of the United States, 9 Wheat. 738; 6 L. ed. 204; Davis v. Gray, 16 Wall. 203; 21 L. ed. 447; Tomlinson v. Branch, 15 Wall. 460; 21 L. ed. 189; Litchfield v. Webster County, 101 U. S. 773; 25 L. ed. 925; Allen v. Baltimore & O. R. Co., 114 U. S. 311; 5 Sup. Ct. Rep. 925; 29 L. ed. 200; Louisiana Board of Liquidation v. McComb, 92 U. S. 531; 23 L. ed. 623; Poindexter v. Greenhow, 114 U. S. 270; 5 Sup. Ct. Rep. 903; 29 L. ed. 185.

[42] 149 U. S. 164; 13 Sup. Ct. Rep. 785; 37 L. ed. 689.

[43] 165 U. S. 107; 17 Sup. Ct. Rep. 262; 41 L. ed. 648.

[44] 178 U. S. 436; 20 Sup. Ct. Rep. 919; 44 L. ed. 1140.

act was valid in so far as it merely changed the means by which the holder of the coupons could compel their application to the payment of taxes when they had been refused acceptance.[48]

In its opinion the court took pains to explain that it did not pass upon the question whether the tax collector was justified in refusing to accept the coupons in payment of taxes, but simply whether, if he did refuse, the remedy provided by the new law was substantially equivalent to that which the holder of the coupons possessed at the time the bonds were issued. Thus the constitutionality of the entire act was not in question, but only that part of it which related to the remedy afforded in case the coupons were refused acceptance. In Poindexter v. Greenhow,[49] however, the constitutionality of the provision of the law of 1882 which required tax collectors to receive in payment of taxes only gold and silver and United States notes and National Bank currency, came up for consideration. Poindexter tendered coupons in payment of his taxes, and, when they were refused acceptance, refused to tender currency, and, when his personal property was seized, brought action of detinue against Greenhow, treasurer and collector of taxes of the city of Richmond, Virginia. Upon appeal to the Supreme Court of the United States, the court held the Virginia act unconstitutional as impairing the obligation of the contract into which the State had entered in 1871, and declared, therefore, that the action of Greenhow in refusing to receive the tender of coupons was unwarranted, and his seizure of the plaintiff's property a trespass.

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[48] From this decision Justice Field dissented. "How can it be maintained," he declared, ". . . that the legislation of January 14 and April 7, 1882, does not impair the obligation of the contract under the Funding Act. It annuls the present receivability of the coupon; it substitutes for the specific execution of the contract, a protracted litigation, and when the genuineness of the coupon and its legal receivability for taxes are judicially established, its payment is made dependent upon the existence of money in the treasury of the State." Justice Harlan also dissented. "To my mind," he said, ". . . the change in the remedies has impaired both the obligation and value of the contract."

[49] 114 U. S. 270; 5 Sup. Ct. Rep. 903; 29 L. ed. 185.

"This immunity from suit, secured to the States," said the court, "is undoubtedly a part of the Constitution, of equal authority with every other, but no greater, and to be construed and applied in harmony with all the provisions of that instrument. That immunity, however, does not exempt the State from the operation of the constitutional provision that no State shall pass any law impairing the obligation of contracts; for it has long been settled that contracts between a State and an individual are as fully protected by the Constitution as contracts between two individuals. It is true that no remedy for a breach of its contract by a State, by way of damages as compensation, or by means of process to compel its performance, is open, under the Constitution, in the courts of the United States, by a direct suit against the State itself, on the part of the injured party being a citizen of another State or a citizen or subject of a foreign State. But it is equally true that whenever in a controversy between parties to a suit, of which these courts have jurisdiction, the question arises upon the validity of a law by a State impairing the obligation of its contract, the jurisdiction is not thereby ousted, but must be exercised, with whatever legal consequences, to the rights of the litigants, may be the result of the determination. The cases establishing these propositions, which have been decided by this court since the adoption of the Eleventh Amendment to the Constitution, are numerous." [50]

"The *ratio decidendi* in this class of cases," the opinion continues, "is very plain. A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such

[50] Citing Fletcher v. Peck, 6 Cranch, 87; 3 L. ed. 162; N. J. v. Wilson, 7 Cranch, 164; 3 L. ed. 303; Green v. Biddle, 8 Wheat. 1; 5 L. ed. 547; Providence Bk. v. Billings, 4 Pet. 514; 7 L. ed. 939; Woodruff v. Trapnall, 10 How. 190; 13 L. ed. 383; Wolff v. New Orleans, 103 U. S. 358; 26 L. ed. 395; Jefferson Branch Bk. v. Skelley, 1 Black, 436; 17 L. ed. 173.

a defendant, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant in the present case undertook to do. He relied on the Act of January 26, 1882, requiring him to collect taxes in gold, silver, United States Treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The constitution of the United States and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character, and, confessing a personal violation of the plaintiff's rights, for which he must personally answer, he is without defense. . . . The thing prohibited by the Eleventh Amendment is the exercise of jurisdiction in a 'suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State.' Nothing else is touched; and suits between individuals, unless the State is the party in a substantial sense, are left untouched, no matter how much their determination may incidentally and consequentially affect the interests of a State or the operations of its government. The fancied inconvenience of an interference with the collection of its taxes by the government of Virginia, by suits against its tax collectors, vanishes at once upon the suggestion that such interference is not possible except when that government seeks to enforce the collection of its taxes contrary to the law and contract of the State and in violation of the Constitution of the United States." [51]

[51] Chief Justice Waite and Justices Miller, Bradley, and Gray dissented.

The law of 1882 having been held void, the State next passed an act requiring the bond to which it had been annexed to be produced when a coupon was presented in payment of taxes. By another act was also prohibited the testimony of "expert" witnesses as to the genuineness of the coupons. These laws the Virginia court held constitutional.

In McGahey v. Virginia[52] when the State brought suit for taxes against certain individuals who had tendered payment in coupons but had not produced the bond to which they had been attached, as provided for by the Virginia law, spoken of above, the Supreme Court held this provision unconstitutional as an unreasonable condition, and, therefore, as impairing the obligation entered into by the State in 1871. "If enforced," said the court, "it would have the effect of rendering valueless all coupons which have been separated from the bonds to which they were attached, and have been sold in the open market. It would deprive them of their negotiable character. . . . It would be so onerous and impracticable as not only to affect, but virtually destroy, the value of the instruments in the hands of the holder who had purchased them." In like manner the provision prohibiting expert testimony establishing the genuineness of the coupons was held unconstitutional and void. Also was held unconstitutional, as unreasonable, the law which the State had passed requiring for the sale of coupons a license fee of one thousand dollars in towns of more than 10,000 inhabitants, and of five hundred dollars in other counties and towns, together with an exaction of twenty per cent. of the face value of every coupon sold. A law fixing a limit of time within which the coupons should be presented or tendered in payment of taxes met a similar fate. In 1886 Virginia had passed an act providing that any lawyer who should give his professional services in matters pertaining to payment to the State of coupons for taxes or other demands, should be adjudged guilty of barratry and be disbarred, and that any one not a lawyer, who should tender advice or

[52] 135 U. S. 662; 10 Sup. Ct. Rep. 972; 34 L. ed. 304.

assistance in reference to these matters should be held guilty of champerty and subjected to a fine of three hundred dollars and imprisonment for sixty days. In pursuance of this law it became known that the grand jury was considering indictments against a Mr. Royall, a lawyer who had been for years identified with suits brought to compel the acceptance by the State of the coupons of the bonds of 1871. Thereupon Mr. Royall published a letter in which he asserted that the law in question was unconstitutional and that he would sue for damages any member of the grand jury who should find a true bill against him for a violation of it. Upon this, the grand jury reported that it had sufficient evidence to indict Mr. Royall, but that in view of his threats, it would not return a true bill against him. A Virginia court thereupon fined Mr. Royall for an attempt to intimidate the grand jury, and in default of payment of the fine committed him to jail. Mr. Royall sued out a writ of habeas corpus to a federal court, which discharged him upon the ground that it was a right of a citizen of the United States to sue, or threaten to sue, whomsoever he pleased. The final judicial phase of the controversy was brought before the Supreme Court in the case of McCullough v. Virginia,[53] a case which has already been considered in the chapter dealing with the Obligation of Contracts.[54]

§ 624. In Re Ayers.

In 1884, the State of Virginia had passed an act which became known as the "coupon crusher," which provided that when coupons were tendered, the collector was to report the fact to the law officer of the Commonwealth and he was to bring suit for the taxes for the payment of which they were offered, and, if the coupons should not prove genuine, judgment, interest, a penalty, and an attorney's fee were to be given against the one offering them; execution should issue on the judgment, and if this was not paid, a second suit, with more interest, penalties, and attorney's fees should be brought, and so on *ad infinitum.*

[53] 172 U. S. 102; 19 Sup. Ct. Rep. 134; 43 L. ed. 182.

[54] See section 513.

An injunction was asked by certain citizens and granted by a federal circuit court to restrain the attorney-general of the State from putting these acts into force. This injunction that officer disobeyed. For this he was fined by the circuit court and, upon his refusal to pay the fine, was committed to jail. Thereupon he sued out a writ of habeas corpus to the Supreme Court of the United States.[55]

That court held that the writ of injunction had been improvidently granted, that the commitment for contempt was consequently void, and released Ayers. The following was the argument of the court. The tender of the coupon, though constituting upon its face a legal tender of payment of taxes, did not deprive the State of the right to attempt by suit to prove the coupons not valid, and, therefore, that their tender in payment of the taxes was not a sufficient tender. The bringing of a suit by the law officer of the State after tender of coupons had been made was, in itself, no violation of a personal or property right and was in itself the breach of no contract. Indeed, the court declared, there was not a contract between the bondholders and the law officers of the State, personally considered. The suit was, therefore, not against them personally, but as officers of the State, to prevent them from bringing suits in the name and for the use of the State of Virginia. Therefore, it was declared, to restrain them was directly to coerce the State by judicial process at the instance of private individuals, a proceeding which the Eleventh Amendment forbids. But, the court is careful to say, "it is not intended in any way to impinge upon the principle which justifies suits against individual defendants who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus where such suits are authorized by law, and the act to be done

[55] *Ex parte* Ayers, 123 U. S. 443; 8 Sup. Ct. Rep. 164; 31 L. ed. 216.

or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest." [56]

§ 625. Reagan v. Trust Co.

In Reagan v. Farmers' Loan & Trust Co.[57] an injunction was sustained against the attorney-general of a State and the members of a state board of railway commissioners, restraining them from putting into force a schedule of rates which the board, acting under statutory authority, had established. The jurisdiction of the lower federal court which had granted the writ was sustained, among other grounds, for the reason that the Eleventh Amendment did not apply to cases in which the States have not a pecuniary or proprietary interest, but only a governmental interest in the matter involved. The same position seems to have been accepted in Smyth v. Ames.[58]

In the Reagan case the court say: "So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character, and, as an individual employs the railroad company to carry its property." "There is a sense, doubtless," the opinion continues, "in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of

[56] Citing with approval Board of Liquidation v. McComb, 92 U. S. 531; 23 L. ed. 623.

Justice Harlan rendered a dissenting opinion in which he declared: "The difference between a suit against officers of the State, enjoining them from seizing property of the citizen, in obedience to a void statute of the State, and a suit enjoining such officers from bringing under the order of the State, and in her name, an action which, it is alleged, will result in injury to the rights of the complainant, is not a difference that affects the jurisdiction of the court, but only its exercise of jurisdiction. If the former is not a suit against the State, the latter should not be deemed of that class."

[57] 154 U. S. 362; 14 Sup. Ct. Rep. 1047; 38 L. ed. 1014.

[58] 169 U. S. 466; 18 Sup. Ct. Rep. 418; 42 L. ed. 819.

its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment."

The position here taken, it is to be observed, furnishes but one of the grounds upon which the decision of the case at bar is rested, and, it would seem, not a very strong one, especially if there be taken into consideration the position which has since been taken by the court in Missouri v. Illinois[59] and Kansas v. Colorado[60] that the State in its character as *parens patriæ* may bring suit to maintain the general interests of its citizens.

§ 626. Fitts v. McGhee.

Furthermore, in Fitts v. McGhee,[61] a case in which was dissolved an injunction obtained by a railroad company preventing the attorney-general of a State from executing an act which the plaintiff alleged to be unconstitutional, the court does not refer to the distinction made in the Reagan case and accepted in the Smyth case, but, instead, advances a new test for distinguishing between those suits against state officials which are to be held suits against the State, and those which are not.

After reviewing the case of *In re* Ayers and holding that it covered the case at bar, the court say: "It is to be observed that neither the attorney-general of Alabama nor the solicitor of the eleventh judicial circuit of the State appear to have been charged by law with any special duty in connection with the act of February 9, 1885." After citing the cases relied upon by the petitioner,[62] the court continue: "Upon examination it will be found that the defendants in each of those cases were officers of

[59] 180 U. S. 208; 21 Sup. Ct. Rep. 331; 45 L. ed. 497.

[60] 206 U. S. 46; 27 Sup. Ct. Rep. 655; 51 L. ed. 956.

[61] 172 U. S. 516; 19 Sup. Ct. Rep. 269; 43 L. ed. 535.

[62] Poindexter v. Greenhow, 114 U. S. 270; 5 Sup. Ct. Rep. 903; 29 L. ed. 185; Allen v. Railroad, 114 U. S. 311; 5 Sup. Ct. Rep. 925; 29 L. ed. 200; Pennoyer v. McConnaughy, 140 U. S. 1; 11 Sup. Ct. Rep. 699; 35 L. ed. 363; *In re* Tyler, 149 U. S. 164; 13 Sup. Ct. Rep. 785; 37 L. ed. 689; Reagan v. Trust Co., 154 U. S. 362; 14 Sup. Ct. Rep. 1047; 38 L. ed. 1014; Scott v. Donald, 165 U. S. 58; 17 Sup. Ct. Rep. 265; 41 L. ed. 632; Smyth v. Ames, 169 U. S. 466; 18 Sup. Ct. Rep. 418; 42 L. ed. 819.

the State, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing, or were about to commit, some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals, holding official positions under a State to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney-general, based upon the theory that the former, as the executive of the State, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney-general, might represent the State in litigation involving the enforcement of its statutes That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."

§ 627. In Re Young.

In *Re* Young[63] a further extension of the authority of the federal courts to enjoin the execution by state officials of a state law alleged to be unconstitutional was made necessary. In this case a maximum freight rate law had been enacted. No state

[63] 209 U. S. 123; 28 Sup. Ct. Rep. 441; 52 L. ed. 714.

officers were especially charged by the law with the enforcement of the act, and, therefore, the only opportunity offered the railway companies to contest the constitutionality of the law, was upon a petition for an injunction, or by refusing obedience to its provisions, and raising the point when action should be brought against them to enforce the penalties prescribed by the law for its violation. But this latter mode was, by the enormous penalties which were provided, made practically unavailable. Under the circumstances a lower federal court issued an injunction restraining the attorney-general from instituting any proceedings to enforce the law; this injunction was violated by that officer, an order was issued by the circuit court directing the attorney-general to show cause why he should not be punished for contempt, that officer denied the jurisdiction of the court, and on petition for writs of habeas corpus and certiorari the case was brought before the Supreme Court. That tribunal held the rate law, by the enormous penalties which it imposed as the result of an unsuccessful attempt to test its validity, unconstitutional upon its face, without regard to the question of the insufficiency of the rates. "We have, therefore," say the court, "upon this record the case of an unconstitutional act of the state legislature and an intention by the attorney-general of the State to endeavor to enforce its provisions, to the injury of the company, in compelling it, at great expense, to defend legal proceedings of a complicated and unusual character, and involving questions of vast importance to all employees and officers of the company, as well as to the company itself. The question that arises is whether there is a remedy that the parties interested may resort to, by going into a federal court of equity, in a case involving a violation of the federal Constitution, and obtaining a judicial investigation of the problem, and pending its solution obtain freedom from suits, civil or criminal, by a temporary injunction, and if the question be finally decided favorably to the contention of the company, a permanent injunction restraining all such actions or proceedings."

As to the case of Fitts v. McGhee the court deny that it overruled the doctrine of Reagan v. Farmers' Loan & Trust Co. or of Smyth v. Ames. In the Fitts case, the court say, the state officer who was made a party bore no close official connection with the statute in question, and the making of him a party defendant was there a simple effort to test the constitutionality of the law in a way that, upon principle, could not be done. The court then go on to state that the true doctrine is that while, in making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is necessary that such officers must have some connection with the enforcement of the act ("or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party"), it is not necessary that such duty shall be declared in the act which he is called upon to enforce. "The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law or is specially created by the act itself is not material so long as it exists."

To the objection that the injunction was an interference with the discretionary power of the attorney-general as to the enforcement of the act, the court point out that no affirmative action of any nature is directed. "The officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he had no legal right to do is not an interference with the discretion of an officer."

In Murray v. Wilson Distilling Co.[64] the important doctrine is declared that when a State undertakes a private business, as, for example, the selling of liquor, it does not forfeit its immunity to suit under the Eleventh Amendment, and may not, therefore, be sued with reference to transactions connected with such non-governmental business. In South Carolina v. United States[65] it will be remembered that the Supreme Court recognized a clear

[64] 213 U. S. 151; 29 Sup. Ct. Rep. 458.

[65] 199 U. S. 437; 26 Sup. Ct. Rep. 110; 50 L. ed. 261.

line of decision between state functions essentially political or governmental in nature, and those of a private or commercial character, and said that, as to these, the limitation upon the taxation by the Federal Government of State agencies does not apply. Furthermore, as has been earlier pointed out, corporations wholly or in part owned by a State are not, for that reason, exempt from suit, but the State when it becomes the owner and participant in the management of a private enterprise throws off, as to such enterprise, its sovereign character. The question raised in the case of Murray v. Wilson Distilling Co. is whether the same doctrine as to immunity of suit applies when the business is directly conducted by a State itself and not through a private corporation, chartered by itself, and of whose stock it is the part or sole owner.

§ 628. Suits to Recover Specific Pieces of Property Held by the State.

Thus far in the discussion of the suability of the State, according to American constitutional law, reference has been had to suits involving the recovery of money judgments or the issuance of writs of mandamus or of injunction to state officials. There now is to be considered the question whether the principles that have been laid down are sufficient to warrant suits brought by individuals to recover possession of specific pieces of property held, in their official capacities, by officials of the States or of the United States.

§ 629. Set-offs Against the State.

In United States v. Clarke[66] it was declared by Marshall that the United States was not suable of common right, and that unless the plaintiff could bring his suit within the terms of some permissive act of Congress, the court could not entertain it.

In The Siren v. United States[67] this was quoted with approval and the further observation made that the exemption from suit

[66] 8 Pet. 436; 8 L. ed. 1001.
[67] 7 Wall. 152; 19 L. ed. 129.

extends to the property of the United States. The further doctrine, which had been previously declared in several cases, was affirmed in this case, that "although direct suits cannot be maintained against the United States, nor against their property, yet when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed. . . . They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy."

§ 630. Liens.

The interesting point was, however, made in this case, that though a lien attaching to a piece of property owned by the State is not enforceable, the lien itself may exist, and becomes enforceable as soon as the State voluntarily sells or otherwise parts with the actual possession of the property. Thus in the case at bar which was a suit to subject the proceeds from the sale of a ship, taken as a prize of war by the United States, to a claim for damages occasioned by the collision of that ship with a ship privately owned, the court granted the claim, saying:

"The authorities to which we have referred are sufficient to show that the existence of a claim, and even of a lien upon property, is not always dependent upon the ability of the holder to enforce it by legal proceedings. A claim or lien existing and continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and control. Then the rights and interests of all parties will be respected and maintained. Thus, if the government, having the title to land subject to the mortgage of the previous owner, should transfer the property, the jurisdiction of the court to enforce the lien would at once attach, as it existed before the acquisition of the property by the government.

"So, if the property belonging to the government, upon which claims exist, is sold upon judicial decree and the proceeds are paid into the registry, the court would have jurisdiction to direct the claims to be satisfied out of them. Such decree of sale could only be made upon application of the government, and by its appearance in court, as we have already said, it waives its exemption and submits to the application of the same principles by which justice is administered between private suitors.

"Now, it is a settled principle of admiralty law, that all maritime claims upon the vessel extend equally to the proceeds arising from the sale and are to be satisfied out of them. Assuming, therefore, that The Siren was in fault and that by the tort she committed a claim was created against her, we do not perceive any just ground for refusing its satisfaction out of the proceeds of her sale. The Government is the actor in the suit for her condemnation. It asks for her sale, and the proceeds coming into the registry of the court, come affected with all the claims which existed upon the vessel created subsequent to her capture."

In The Davis[68] it was held that personal property of the United States was subject to a lien for salvage purposes, if such property was not actually in the possession of the United States, and if the lien could be enforced without bringing a direct suit against the United States. Defining what should be deemed possession under this rule, the court said that it must be an actual and not a constructive one — one that "can only be changed under process of the court by bringing the officer of the court into collision with the officer of the Government, if the latter should choose to resist."

§ 631. The Arlington Case: United States v. Lee.

In 1882 was decided the famous case of United States v. Lee.[69] The facts upon which the case was based were these: The Robert E. Lee homestead, the Arlington Estate, had been for ten years

[68] 10 Wall. 15; 19 L. ed. 875.

[69] 106 U. S. 196; 1 Sup. Ct. Rep. 240; 27 L. ed. 171.

in possession of the United States under a title acquired by sale for non-payment of taxes. The plaintiff, heir of Robert E. Lee, claiming that this title was an invalid one, brought suit in ejectment against the federal officers in charge of the property to recover possession of it. The United States, by its Attorney-General, intervened for the purpose of setting up its title and moving that the suit be dismissed as being in effect a suit against itself. Upon appeal to the Supreme Court of the United States that court, upon the first hearing, eight judges sitting, divided equally upon the point whether the suit was to be regarded as a suit against the United States and, therefore, beyond judicial cognizance, and ordered a second hearing before a full court of nine justices. By a bare majority of five to four, it was held upon the second hearing that, though the property was claimed by the United States, the suit might be maintained against the federal officers in possession of the property to determine whether or not the federal title which they alleged to support them in their possession was a valid one, and that, if not valid, they might be ejected. Justice Miller rendered the majority opinion.

After a review of the previously decided cases, in which especial emphasis was laid upon the cases of United States v. Peters,[70] Meigs v. McClung,[71] and Osborn v. Bank of the United States[72] which, it was declared, governed the case at bar, Justice Miller went on to state what was after all to be considered the real ground upon which the suit was sustained. This was, that it was not in consonance with the general principles of American political philosophy to hold that the citizen could not be protected against an unconstitutional act of his State.

"It is not pretended, as the case now stands," said he, "that the President had any lawful authority to do this, nor that the legislative body could give him any such authority, except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of everyone

[70] 5 Cr. 115; 3 L. ed. 53.
[71] 9 Cr. 11; 3 L. ed. 639.
[72] 9 Wh. 738; 6 L. ed. 204.

who asserts authority from the executive branch of the Government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive anyone of life, liberty or property without due process of law, or to take private property without just compensation. . . . No man in this county is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of that law and are bound to obey it. . . . It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court: Stop here; I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function; though the United States is no party to the suit; though one of the three great branches of the Government, to which by the Constitution this duty has been assigned, has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen."

§ 632. The Doctrine of United States v. Lee Applied to a State.

In Tindal v. Wesley[73] the doctrine of United States v. Lee was applied to a State of the Union, the court in its opinion saying: "Whether the one or the other party is entitled in law to possession is a judicial, not an executive or legislative question. It does not cease to be a judicial question because the defendant claims that the right of possession is in the government of which he is an officer or agent. . . . But the Eleventh Amendment gives no immunity to officers or agents of a State in withholding

[73] 167 U. S. 204; 17 Sup. Ct. Rep. 770; 42 L. ed. 137.

the property of a citizen without authority of law. And when such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff. . . . It is said that the judgment in this case may conclude the State. Not so. It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is without legal foundation. The State not being a party to the suit, the judgment will not conclude it. Not having submitted its right to the determination of the court in the case, it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim."

§ 633. Suit Maintainable only Where the Action Against the Officer is a Possessory One.

This language in Tindal v. Wesley causes the doctrine declared in United States v. Lee to appear more plainly to be that the court still holds to the doctrine that any suit against officers of a State, the judgment or decree in which will be conclusive of the rights of the State, will be regarded as a suit against the State. Whence it follows that an action of ejectment against persons in possession of property title to which is claimed by the State, or alleged by the defendants to be in the State, will be considered to be not a suit against the State only in those cases where there is failure to produce at least *prima facie* evidence of title in the State, and in these only if the action of ejectment is treated as a possessory one and not one determining title.

This latter principle is definitely stated in Stanley v. Schwalby,[74] in which an action of ejectment against persons holding property for the State was held to be a suit against the State, because in that State such an action was regarded as one determining title. With reference to the doctrine declared in the Lee case the court emphasize the fact that the judgment affirmed was simply that the plaintiffs recover against the individual defendants the possession of the property in controversy and costs, "and," the court declare, "this court distinctly recognized that, if the title of the United States were good, it would be a justification of the defendants; that the United States could not be sued directly by original process as a defendant, except by virtue of an express act of Congress; and that the United States would not be bound or concluded by the judgment against their officers."[75]

§ 634. Recent Cases.

The latest judicial phases of the suability of the United States are to be found in Belknap v. Schild,[76] Minnesota v. Hitchcock,[77] Oregon v. Hitchcock,[78] and International Postal Supply Co. v. Bruce.[79] In the first of these cases an injunction was sought against the commandant of a United States navy yard to prevent the use there of a caisson gate contrary to the patent rights of the plaintiff. The injunction was denied.

The court, after holding that there was a distinction between a property right in an article which infringed a patent right and that patent right itself, and that, thus, though the issuance in pursuance of an act of Congress of a patent right creates a right in

[74] 162 U. S. 255; 16 Sup. Ct. Rep. 754; 40 L. ed. 960.

[75] In Cunningham v. Macon & B. R. Co. (109 U. S. 446; 3 Sup. Ct. Rep. 292; 27 L. ed. 992), the court, defining the doctrine of the Lee case, say: "The action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore possession to the plaintiff as part of the judgment. . . . The judgment in that case did not conclude the United States, as the opinion carefully stated, but held the officers liable as unauthorized trespassers and turned them out of their unlawful possession."

[76] 161 U. S. 10; 16 Sup. Ct. Rep. 443; 40 L. ed. 599.

[77] 185 U. S. 373; 22 Sup. Ct. Rep. 650; 46 L. ed. 954.

[78] 202 U. S. 60; 26 Sup. Ct. Rep. 568; 50 L. ed. 935.

[79] 194 U. S. 601; 24 Sup. Ct. Rep. 820; 48 L. ed. 1134.

the patentee against the United States as well as against individuals, there is nothing to prevent the United States becoming the owner of the article that infringed a patent right, continue:

"In the present case, the caisson gate was a part of the dry dock in a navy yard of the United States, was constructed and put in place by the United States, and was the property of the United States, and held and used by the United States for the public benefit. If the gate was made in infringement of the plaintiff's patent, that did not prevent the title in the gate from vesting in the United States. The United States, then, had both the title and the possession of the property. The United States could not hold or use it, except through officers and agents. Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction and for the destruction of the gate in question, the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession; the United States were the only real party, against whom alone in fact the relief was asked, and against whom the decree would effectively operate; the plaintiff sought to control the defendants in their official functions, as representatives and agents of the United States, and thereby to defeat the use by the United States of property owned and used by the United States for the common defense and general welfare; therefore the United States was an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought; and the suit could not be maintained without violating the principles affirmed in the long series of decisions of this court, above cited."

In International Postal Supply Co. v. Bruce[80] an injunction was asked to restrain a federal postmaster from using a leased machine which infringed a patent owned by the plaintiff. Again the relief asked for was refused, the court holding that the United States, though not the owner of the machine, had a property right

[80] 194 U. S. 601; 24 Sup. Ct. Rep. 820; 48 L. ed. 1134.

— a right *in rem* — in it, and was in possession, and that, therefore, the case was governed by Belknap v. Schild.[81]

In Minnesota v. Hitchcock[82] suit was brought against the Secretary of the Interior and the Commissioner of the General Land Office of the United States, to restrain them from selling certain lands in the Indian reservation. The suit was held to be one against the United States, but was entertained by the court on the ground that by virtue of an act of Congress the United States had consented to be sued. In Oregon v. Hitchcock,[83] however, in which suit was brought to restrain the patenting to individuals of certain lands and a decree establishing the title of the State of Oregon to them, the court declined jurisdiction, no statutory consent of the United States to suit appearing.

§ 635. Suability of Minor Political Bodies.

In conclusion of this subject it is to be observed that the principle of the non-amenability of the States of the Union to suit does

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[81] Justice Harlan rendered a dissenting opinion, maintaining as he had in a dissent in Belknap v. Schild, that, under the doctrine declared in United States v. Lee, the court would be empowered to enjoin the defendants individually. "I am of the opinion," he said, "that every officer of the government, however high his position, may be prevented by injunction, operating directly upon him, from illegally injuring or destroying the property rights of the citizen; and this relief should more readily be given when the government itself cannot be made a party of record.

"The courts may, by mandamus, compel a public officer to perform a plain, ministerial duty prescribed by law; and that may be done, although the government itself cannot be made a party of record. Can it be possible that the court is without authority to enjoin the same officer from doing a direct, affirmative wrong to the property rights of the citizen, upon the ground that the government whom he represents, and in whose interest he is acting, is not and cannot be made a party of record? The present decision — erroneously, I take leave to say — answers this question favorably to the defendant. But that answer cannot, I submit, be made consistently with the declaration which this court has often repeated, that no officer of the law, however high his position, can set that law at defiance with impunity; that the government, as well as the citizen, is subject to the Constitution, and therefore cannot legally appropriate or use a patented invention without just compensation any more than it can appropriate or use, without compensation, land that it had patented to a private purchaser."

[82] 185 U. S. 373; 22 Sup. Ct. Rep. 650; 46 L. ed. 954.

[83] 202 U. S. 60; 26 Sup. Ct. Rep. 568; 50 L. ed. 935.

not extend to their political subdivisions. These may be sued in contract, and even in tort, money judgments may be rendered against them, and mandamus may be awarded to compel the necessary appropriation and the levying and collection of taxes to pay the judgments thus rendered. In some cases also, the private property of such public corporations which is not directly used in the public service may be sold on execution.[84] As regards this liability to suit, there is, however, a distinction to be made between municipal corporations, and those known as quasi-municipal. The latter may not be sued in tort except by express statutory permission. The former, however, may be sued in tort, since they are deemed to be organized for the peculiar advantage of those living within their areas, and thus not acting, as it were, as the agent of the sovereignty, do not enjoy its special exemptions, but are subject to the rules of private law.

It is, however, to be observed that in so far as these municipal corporations may properly be held to represent the sovereignty and to exercise purely governmental powers, they are not generally held responsible for damages arising from the exercise of such powers.

§ 636. Statutory Consent of the United States and of the States to Be Sued.

The United States by act of Congress and various of the States of the Union by constitutional or statutory provision, have consented to be sued by individuals as to specified matters.[85]

In all cases, however this suability has been limited to actions in contract, express or implied. In no case have they rendered themselves pecuniarily responsible for the tortious acts of their agents. From a viewpoint of strict equity, and the general doctrine governing the responsibility of the principal for the

[84] Meriwether v. Garrett, 102 U. S. 472; 26 L. ed. 197; Rees v. Watertown, 19 Wall. 107; 22 L. ed. 72.

[85] The exemption of the United States from suit may be waived only by legislative act and not by the secretary of war or the attorney general or any other officer not expressly authorized so to do. Stanley v. Schwalby, 162 U. S. 255; 16 Sup. Ct. Rep. 754; 40 L. ed. 960.

acts of his agents, it might seem strange that claims of the individual against his State based upon contract are allowed to be adjudicated, whereas those based upon tort are not; in other words, that, the more wrongful and illegal the acts of the agents, the less liable is his principal. This state of the law, however, is a logical and necessary outcome of the general principle of American and English law that an *ultra vires* act of a public official is not the act of his government, but is a private act for which he may be held civilly and criminally responsible.[86]

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[86] For an argument as to the justice as well as the expediency of holding the sovereign State liable for the torts of its agents, especially when it acts as the owner of, or in relation to, private property, see article by Professor Ernst Freund entitled "Private Claims against the State," in *Political Science Quarterly*, VII, 625. Professor Freund says: "The principal torts which may be imputable to the government in connection with its private relations, are negligence, non-compliance with statutory regulations, nuisance, trespass, and disturbance of natural easements. It is characteristic of these torts that they violate obligations which are cast by law upon the ownership or occupation or control of property, that they are sometimes not directly attributable to a specific act of any particular agent, and that the existence of the wrongful condition is usually of some benefit to the owner. The liability of the State in these cases is demanded not only by justice but by the logic of the law."

For a description of the jurisdiction of the United States Court of Claims, see *ante*, section 564.

CHAPTER LV.

ADMIRALTY AND MARITIME JURISDICTION.

§ 637. Admiralty and Maritime Jurisdiction Defined.

Section II, Clause 1, of Article III provides that "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."

Admiralty jurisdiction refers to that class of cases which are cognizable in courts established by an admiral, in that officer being vested, according to English law, the government of the King's navy and the authority to hear all causes connected with the sea.

Maritime jurisdiction, as the name itself indicates, is the jurisdiction over matters relating to the sea. To a very considerable extent, then, admiralty jurisdiction and maritime jurisdiction are of like meaning. The terms are not, however, synonymous. Admiralty now has reference, primarily, to the tribunals in which the causes are tried; maritime to the nature of the causes tried. The admiralty and maritime jurisdiction of the United States is then of a double nature; that over cases depending upon acts committed upon navigable waters; and that over contracts, and other transactions connected with such navigable waters. In the former class of cases the jurisdiction is given by the locality of the act; in the latter class by the character of the act or transaction.

The cases falling within the federal admiralty jurisdiction because of the locality, *i. e.,* arising upon the high seas and other navigable waters, are, broadly speaking, of two classes; those of prize, arising *jure belli;* and those acts, torts, injuries, etc., which have no reference to a state of war.

Those cases which fall within the admiralty jurisdiction purely because of their maritime nature are those arising out of contracts, claims, etc., with reference to maritime operations. In actions of tort the test determining jurisdiction is locality; in contracts, it is the subject-matter.[1]

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[1] Waring v. Clarke, 5 How. 441; 12 L. ed. 226; New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344; 12 L. ed. 465. The distinction between admiralty and maritime jurisdiction suggested above is not exactly that, originally at least, of the English law. See Benedict's *Admiralty*, ch. 4.

§ 638. Extent of Admiralty Jurisdiction.

Following strictly the rule of giving to the technical terms of the Constitution the meanings attached to them in the English common law, the admiralty jurisdiction of the United States courts, so far as dependent upon locality, would be limited to that exercised in the English admiralty courts at the time the Constitution was adopted. This jurisdiction of the English courts had varied considerably at different periods but at the time the American Constitution was adopted had, by the efforts of the common law judges, led by Coke, been reduced to comparatively narrow limits.

There was at first a disposition upon the part of the Supreme Court to give to the federal courts a narrow admiralty jurisdiction corresponding with that then exercised by the English court, but, moved especially by the arguments of Justice Story, a much wider sphere of admiralty power has been later upheld.

According to the earlier decisions, the federal admiralty jurisdiction was confined to cases arising upon the high seas and upon rivers as far as the ebb and flow of the tide extended. Beginning, however, with Waring v. Clarke, and The Genesee Chief,[2] decided in 1851, the earlier cases were overruled, and the federal power declared to extend over all waters that are navigable. The case of The Genesee Chief arose under, and, therefore, involved the constitutionality of, the act of Congress of 1845 extending the jurisdiction of the federal district courts to certain cases upon the great lakes and upon the navigable waters connecting them.

Chief Justice Taney rendered the opinion of the court. In it he first calls attention to the fact that the statute was not one in exercise of the power of Congress to regulate foreign or interstate commerce, and that, though closely related, the federal commercial and admiralty powers are to be clearly distinguished from each other. "The extent of the judicial power," says the chief justice, "is carefully defined and limited, and Congress cannot enlarge it to suit even the wants of commerce, nor for the more convenient execution of its commercial regulations. And

[2] 12 How. 443; 13 L. ed. 1058.

the limits fixed by the Constitution to the judicial authority of the courts of the United States, would form an insuperable objection to this law, if its validity depended upon the commercial power. . . . If this law, therefore, is constitutional, it must be supported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction as known and understood in the United States when the Constitution was adopted."

The opinion continues: "If the meaning of these terms was now for the first time brought before this court for consideration, there could, we think, be no hesitation in saying that the lakes and their connecting waters were embraced in them. These lakes are in truth inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the Admiralty Court to administer international law, and if the one cannot be established, neither can the other.

"Again, the Union is formed on the basis of equal rights among all the States. Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies, where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed to confine these rights to the States bordering on the Atlantic, and to the tidewater rivers connected with it, and to deny them to the citizens who border on the lakes, and the great navigable streams which flow through the western States. Certainly such was not the intention of the framers of the Con-

stitution; . . . The only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them; . . . Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it."

The chief justice then points out that the limitation of admiralty jurisdiction to tidal waters is a reasonable one in England because in that country there are no navigable streams which go beyond the flow and ebb of the tide; and that at the time this rule was accepted by the court in this country there was little commerce except upon such waters. Referring to the case of The Thomas Jefferson, the opinion concludes: "As we are convinced that the former decision was founded in error, if not corrected, must produce serious public as well as private inconvenience and loss, it becomes our duty not to perpetuate it."

The limitation of admiralty jurisdiction to tidal waters being abandoned, the further extension of the jurisdiction to all the great navigable waters within the United States soon followed.[3]

§ 639. Admiralty Jurisdiction Extends to Navigable Waters Wholly Within a State.

The federal admiralty jurisdiction being wholly independent of the power to regulate interstate commerce, and attaching whenever the cause of action has arisen on navigable water, jurisdiction extends over all cases arising upon navigable waters even though they be wholly within the confines of a particular State, provided they be connecting links in a chain of commercial communication between States. In The Daniel Ball[4] the court say: "Those rivers must be regarded as public navigable rivers in law

[3] The Magnolia, 20 How. 296; 15 L. ed. 909.
[4] 10 Wall. 557; 19 L. ed. 999.

which are navigable in fact. And they are navigable in fact when they are so used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

In The Montello[5] the same principle was applied to the Fox river of Wisconsin, although its navigability was interrupted by rapids and falls around which portages had to be made.

Federal admiralty jurisdiction is not affected by the fact that at the time of the accruing of the cause of action the vessel or vessels concerned are upon a voyage between ports of the same State.[6]

§ 640. Extent of Federal Admiralty Jurisdiction.

Federal admiralty jurisdiction being distinct from the commerce power, and navigability accepted as the criterion warranting the exercise of federal authority, it might appear that there would be no constitutional difficulty in the way of a provision by Congress that the navigable waters within the United States include those located entirely within a State and not constituting links in a continued highway over which commerce is or may be carried on with other States or foreign countries. In fact, however, there is no need for such an extension of federal authority, and, therefore, the reasoning employed in The Genesee Chief case to justify the departure from the English rule would not apply.

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[5] 20 Wall. 430; 22 L. ed. 391.

[6] The Belfast (7 Wall. 624; 19 L. ed. 266), overruling previous cases as to this. For an argument that the federal admiralty jurisdiction should not be construed to extend to contracts for the repairs of vessels engaged wholly in commerce wihin a State, see the dissenting opinion of Brewer in Perry v. Haines, 191 U. S. 17; 24 Sup. Ct. Rep. 8; 48 L. ed. 73.

§ 641. Canals.

In later cases the admiralty jurisdiction of the United States has been construed to extend to cases arising on canals.[7]

In the former of these cases it was held that the canals are navigable waters within the meaning of admiralty law; in the latter that canal-boats are ships or vessels within the meaning of the same law. In the latter case the court say: "The only distinction between canals and other navigable waters is that they are rendered navigable by artificial means, and sometimes, though by no means always, are wholly within the limits of a particular State. We fail to see, however, that this creates any distinction in principle. . . . If it be once conceded . . . that navigable canals used as highways for interstate or foreign commerce are navigable waters of the United States, it would be an anomaly to hold that such jurisdiction did not extend to the only craft used in navigating such canals." As regards the argument that admiralty jurisdiction should not attach for the reason that the canal-boats are drawn by mules or horses walking on land, the court say: "This . . . is an argument which appeals less to the reason than to the imagination. So long as the vessel is engaged in commerce and navigation it is difficult to see how the jurisdiction of admiralty is affected by its means of propulsion, which may vary in the course of the same voyage, or with new discoveries made in the art of navigation."

§ 642. Repairs on Land and in Dry Dock.

It has been held that repairs made to, or injuries sustained by, a ship while in dry dock are maritime in character, but the dry dock not being itself used for the purpose of navigation is not a subject of salvage service or of admiralty jurisdiction.[8]

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[7] *Ex parte* Boyer, 109 U. S. 629; 3 Sup. Ct. Rep. 434; 27 L. ed. 1056; and Perry v. Haines, *sub. nom.* The Robert W. Parsons, 191 U. S. 17; 24 Sup. Ct. Rep. 8; 48 L. ed. 73.

[8] Cope v. Vallette Dry Dock Co., 119 U. S. 625; 7 Sup. Ct. Rep. 336; 30 L. ed. 501. See also Simmons v. The Jefferson, Sup. Ct. Rep., adv. sheets, 1910.

§ 643. Admiralty Jurisdiction Does not Carry with It General Political Jurisdiction Over Navigable Waters.

It has been held in an unbroken line of cases that the grant to the United States of admiralty jurisdiction does not, in itself, carry with it any general or political jurisdiction. That is to say, unless Congress has expressly so legislated, the state courts still have exclusive cognizance of crimes committed upon their navigable waters, and upon the sea within a marine league of the shore. In the leading case of United States v. Bevans[9] Marshall points out that the delegation to the federal judiciary carries with it, indeed, a legislative power to render that jurisdiction effective, but it does not operate to take the navigable and territorial waters of a State from without the general jurisdiction of the State in the sense that districts purchased by the Federal Government, with the consent of the legislature of a State, for the erection of forts, arsenals, etc., are so removed. In his opinion Marshall says: "In describing the judicial power the framers of our Constitution had not in view any cession of territory; or, which is essentially the same, of general jurisdiction: It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a part of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts."[10]

§ 644. Admiralty Courts.

During the colonial period admiralty jurisdiction in this country was exercised by vice-admiralty courts created by commissions from the British High Court of Admiralty, authority being given to the colonial authorities by their charters to estab-

[9] 3 Wh. 336; 4 L. ed. 404.

[10] For a later affirmance of this doctrine, see Manchester v. Massachusetts, 139 U. S. 240; 11 Sup. Ct. Rep. 559; 35 L. ed. 159.

vessel. This is conclusively determined in The Moses Taylor[12] and Hine v. Trevor.[13]

But though the state courts may not exercise admiralty jurisdiction, it has been held that the state legislatures may by statute create maritime rights, which the federal district courts, sitting as admiralty tribunals, will enforce. In other words, the state law-making body may create admiralty rights which the state courts may not enforce as such, but which the federal courts may.[14]

In The Lottawanna case the court say: "It seems to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the rights of material men furnishing necessaries to a vessel in her home port may be regulated in each State by state legislation. State laws, it is true, cannot exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts so far as to enable them to proceed *in rem* for the enforcement of liens created by such state laws, for it is exclusively conferred upon the District Courts of the United States. They can only authorize the enforcement thereof by common-law remedies, or such remedies as are equivalent thereto. But the District Courts of the United States having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by state laws."

The court go on to admit that this is a somewhat anomalous practice, but in justification say: "The practice . . . has existed from the origin of the government and, perhaps, was originally superinduced by the fact that prior to the adoption of the Constitution, liens of this sort created by state laws had been enforced by state courts of admiralty; and as those courts were immediately succeeded by the District Courts of the United States, and in several instances the judge of the state court was trans-

[12] 4 Wall. 411; 18 L. ed. 397.

[13] 4 Wall. 555; 18 L. ed. 451.

[14] The Lottawanna, 21 Wall. 558; 22 L. ed. 654; and The Glide, 167 U. S. 606; 17 Sup. Ct. Rep. 930; 42 L. ed. 296.

ferred to the district court, it was natural, in the infancy of federal legislation in commercial subjects, for the latter courts to entertain jurisdiction over the same class of cases, in every respect, as the state courts had done, without due regard to the new relations which the States had assumed toward the maritime law and admiralty jurisdiction."

In Butler v. Boston Steamship Co.[15] a limitation upon the power of the States to create maritime liens which the federal courts will recognize and enforce is suggested, though not definitely declared. In that case Justice Bradley, after applying an act of Congress in modification of the federal maritime law, and with reference to a cause arising within the territorial limits of a State, said: "It might be a much more serious question whether a state law can have force to create a liability in a maritime case at all, within the dominion of the admiralty and maritime jurisdiction, where neither the general maritime law nor an act of Congress has created such a liability. On this subject we prefer not to express an opinion." This dictum would, however, appear to be overruled in Old Dominion S. S. Co. v. Gilmore.[14a]

The Supreme Court has, however, held that until Congress acts on the subject a State may legislate in regard to the duties and liabilities of its citizens and corporations while on the high seas and not within the territory of any other sovereign, and that where a fund is being distributed in a proceeding to limit the liability of the owners of a vessel all claims to which the admiralty does not deny existence must be recognized whether admiralty liens or not. In this case the vessel belonged to a Delaware corporation. The law of Delaware gave damages for death caused by a tort. The vessel was in collision with another vessel belonging also to a Delaware corporation. It was held that claim against the owner of one of the vessels in fault for such death can be enforced in a proceeding in the admiralty brought by such owner to limit its liability.[14b]

In The Lottawanna case it is pointed out that the general doctrines of maritime law as they are to be deduced from the practice

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14a 207 U. S. 398; 52 L. ed. 264.

14b The Hamilton, 207 U. S. 398; 28 Sup. Ct. Rep. 133; 52 L. ed. 264.

of civilized nations, from the decisions of their courts, and from the comments of scientific writers, are, in the absence of congressional statute to the contrary, to guide the federal courts in the administration of their admiralty jurisdiction.[16]

§ 646. Legislative Powers of Congress Flowing from Admiralty and Maritime Jurisdiction.

The Constitution does not in express terms confer upon Congress the power to legislate with reference to matters maritime, but the grant to the judiciary of jurisdiction over all cases of admiralty and maritime jurisdiction, a jurisdiction which has, as we have seen, been held to be exclusive — has been construed to give to the federal legislature a power over the law which the federal courts are thus called upon to interpret and apply. In The Lottawanna case, the court say: "It is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. . . . Each State adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore,* but as its own law, with such modifications and qualifications as it sees fit. . . . To ascertain, therefore, what the maritime law of the country is, it is not enough to read the French, German, Italian and other foreign works on the subject, or the codes which they have formed; but we must have regard to our own legal history, Constitution, legislation, usages, and adjudications, as well."

In this case the court seem to indicate that the authority of Congress to legislate with reference to matters of maritime interest is derived from its control of commerce, which includes navigation between the States, and between the United States and foreign States. But in later cases Congress is explicitly recognized to have a legislative power flowing directly from the grant to the federal courts of admiralty and maritime jurisdiction. In *Ex parte* Garnett[17] the court say: "It is unnecessary to invoke the power given to Congress to regulate commerce with foreign

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[15] 130 U. S. 527; 9 Sup. Ct. Rep. 612; 32 L. ed. 1017.

[16] Section 586.

[17] 141 U. S. 1; 11 Sup. Ct. Rep. 840; 35 L. ed. 631.

nations, and among the several States, in order to find authority to pass the law in question. The act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendment is co-extensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends." [18]

So also, in Providence & N. Y. S. S. Co. v. Hill Mfg. Co.[19] the court say: "As the Constitution extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction, as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature, and not in the state legislature." [20]

§ 647. The Determination of the Sphere of Admiralty Jurisdiction a Judicial Question.

Though, as appears from the foregoing, Congress, and to a certain extent the state legislatures as well, have the power to fix the substantive law which the federal admiralty courts are to apply, it is not within the power of these law-making bodies to determine the sphere of admiralty jurisdiction. This, it has been held, is a purely judicial function. In The St. Lawrence[21] Taney declares: "Certainly no state law can enlarge the admiralty jurisdiction nor can an act of Congress or rule of court make it

[18] Citing Butler v. Boston & S. S. S. Co., 130 U. S. 527; 9 Sup. Ct. Rep. 612; 32 L. ed. 1017; Norwich, etc. v. Wright, 13 Wall. 104; 20 L. ed. 585; The Lottawanna, 21 Wall. 558; 22 L. ed. 654; The Scotland, 105 U. S. 24; 26 L. ed. 1001; Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578; 3 Sup. Ct. Rep. 379; 27 L. ed. 1038.

[19] 109 U. S. 578; 3 Sup. Ct. Rep. 379; 27 L. ed. 1038.

[20] It is to be remarked that during the early period the power of Congress to legislate with reference to maritime matters was drawn from the Commerce Clause, which had been held to give federal control of navigation between the States and with foreign powers, and it was only later when the admiralty jurisdiction had been construed to extend to all public navigable waters, that the grant of judicial control over admiralty and maritime matters was resorted to as a broader source of federal control.

[21] 1 Black, 522; 17 L. ed. 180.

broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government." And in The Lottawanna case, Justice Bradley says: "The question as to the true limits of maritime law and maritime jurisdiction, is, undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question and no state law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be. But what the law is, within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the usages of this country, and on such legislation as may have been competent to affect it." [22]

From the adoption of the principle that from the grant of judicial power over matters of admiralty and maritime jurisdiction, a federal legislative power is to be deduced is not to be drawn the more general rule that in all cases where federal judicial power is granted, Congress may provide the law which is to be applied in the exercise of that jurisdiction. Thus, for example, such a legislative power is not implied where the judicial power is based not upon the subject-matter in suit, but upon the character of the parties litigant.

As has been earlier shown, in suits between the States the Supreme Court from necessity finds itself obliged to determine the law applicable, which law may not be exactly the law of either of the States; so also, in suits between citizens of different States, for reasons which have been stated, the law of the States, at least as interpreted by their respective courts, is not always followed, but there has never been a suggestion that Congress might enact the law to be applied. Relations between the States of the Union being of a quasi-international character, it is eminently proper

[22] In the Limited Liability Act of 1851, and the Harter act of 1893, Congress has materially altered maritime liabilities as determined by general maritime jurisprudence.

that, when necessary, general principles of jurisprudence should be applied. And where, in suits between citizens of different States, the federal courts do not hold themselves concluded by the decisions of the state courts, it is not upon the ground that federal law as distinct from state law is to be applied, but upon the doctrine that, as independent tribunals, the federal courts have a right, coördinate with that of the state courts, to determine what the state law is.

In the case of admiralty and maritime causes, however, the condition is quite otherwise. Here the state courts have absolutely no jurisdiction. The general principles of the law to be applied are indeed furnished by the admiralty law of the world. But it is necessary that this body of general principles should be subject to change and addition by the legislatures of each country, and as the Supreme Court has said, it would be indeed a strange and undesirable condition of affairs to have this legislation supplied by governments whose courts have no jurisdiction to apply it.

The legislative powers of Congress thus follow *ex necessitate.*

CHAPTER LVI.

IMPEACHMENT.

§ 648. Constitutional Provisions.

The constitutional provisions for impeachments are contained in the clauses quoted in the footnote.[1]

The term "impeachment" was a well known one at the time the Constitution was adopted, having been inherited from English usage. Recourse may, therefore, be had, when necessary, to that usage and practice for interpretative guidance.

§ 649. Persons Subject to Impeachment.

It will be observed that the Constitution makes no mention as to what persons shall be subject to impeachment. According to English precedent all citizens are subject to impeachment, and it was first asserted by some that the same is true in this country.[2]

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[1] Art. I, Sec. II, Cl. 5. "The House of Representatives . . . shall have the sole power of impeachment."

Art. I, Sec. III, Cl. 6. "The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two-thirds of the members present."

Art. I, Sec. III, Cl. 7. "Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law."

Art. II, Sec. II, Cl. 1. "The President . . . shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

Art. II, Sec. IV. "The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

[2] *E. g.*, by Mr. Baynard upon the occasion of the impeachment of Senator Blount. 5 Annals of Congress, 2251. This doctrine was approved by Jefferson, but repudiated by Madison who wrote: "The universality of this power is the most extravagant novelty that has been broached." See article entitled "The Law of Impeachment in the United States," by David Y. Thomas in the *American Political Science Review*, May, 1908. The author is much indebted to this valuable article. Much information regarding impeachments, federal and state, is given by Mr. Roger Foster in the first volume of his *Commentaries*.

The limitation of impeachment to the President and Vice-President and to civil officers of the United States would, however, seem to be implied in the provision that these persons shall be removed from office on impeachment, and that judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold office under the United States, and it is now generally agreed that only civil officers may be impeached.

§ 650. Who are Civil Officers.

Military officers are not subject to impeachment. No attempt has ever been made to impeach an officer of the army or of the navy, and, therefore, there have been no pronouncements upon this point. But there has been no question as to this doctrine.

Members of Congress are not officers of the United States, not being commissioned by the President. This point was made at the time of the impeachment of Senator Blount, a resolution to the effect that he was an officer being negatived by a vote of fourteen to eleven.

§ 651. When a Civil Officer May Be Impeached.

By Story it was held that, to be impeachable, the accused must be at the time in office. He says: "If, then, there must be a judgment of removal from office, it would seem to follow that the Constitution contemplated that the party was still in office at the time of impeachment. If he was not his offense was still liable to be tried and punished in the ordinary tribunals of justice. And it might be argued, with some force, that it would be a vain exercise of authority to try a delinquent for an impeachable offense, when the most important object for which the remedy was given was no longer necessary or attainable."[8] This view, however, has not been accepted, and its reasoning would not seem to be adequate to support it. For, in the first place, it is recognized by the Constitution that the object of impeachment may be not only the removal of the accused from office, but also his disqualification to hold office in the future. In the second place, as will presently appear, impeachment may be based upon other than

[8] *Commentaries*, § 804.

criminal offenses, and, therefore, the argument that the accused may be punished in the ordinary courts of justice has, in those cases, no validity.

When articles of impeachment were brought against Senator Blount his counsel urged, *inter alia,* that the Senate having already expelled him from that body, he was no longer subject to impeachment. It was not urged, however, that this non-amenability to impeachment would have followed from voluntary resignation. "I shall certainly never contend," declared Mr. Ingersoll, one of his counsel, "that an officer may first commit an offense and afterwards avoid punishment by resigning his office."[4] Inasmuch as the Senate held that a Senator was not, under any circumstance, subject to impeachment, it was not necessary to pass upon the plea based upon his prior expulsion. The impeachment finally failed, not, however, upon the question of guilt, but upon the ground that the Senate was without jurisdiction for the reason that members of Congress are not civil "officers" of the United States.

In the case of the impeachment of Secretary of War Belknap, however, the issue was squarely raised whether a civil officer, in anticipation of impeachment, may escape by resignation from liability to trial by the Senate. By a vote of thirty-seven to twenty-nine, seven not voting, it was held that the jurisdiction of that body had not been ousted by the resignation, and by a later vote it was held that for this decision a two-thirds approving majority was not needed. And it may be noted that, in general, it has been held that the constitutional requirement as to the majority needed for conviction applies only to the final votes upon the question of guilt.

§ 652. For What Offenses Impeachment Will Lie.

The constitutional provision is that impeachment may be had for "treason, bribery, or other high crimes or misdemeanors."

The terms "treason" and "bribery" require no definition. Treason is, indeed, defined in the Constitution itself, and the

[4] *Cf.* article by Prof. Thomas in *American Political Science Review.*

offense of bribery is sufficiently definite and well known. To the term "high crimes and misdemeanors," practice has given a broad meaning that brings within its connotation offenses not penal by federal statute. Professor Thomas, in the article to which reference has been made, points out that in the first four impeachment trials not a single charge rested upon a statute, and the same was true of some at least of the articles in most of the trials.

It would also seem to be established that the offense charged need not be one committed in the discharge of official duties.[5]

In short, then, it may be said that impeachment will lie whenever a majority of the House of Representatives are for any reason led to hold that the incumbent of a civil office under the United States is morally unfit for and should no longer remain in his position of public trust.

§ 653. Punishment.

It is constitutionally provided that conviction upon impeachment must result in removal from office. To this may be added disqualification to hold and enjoy in the future any office of honor, trust, or profit under the United States. Where a criminal offense has been committed the party convicted is still "liable and subject to indictment, trial, judgment and punishment according to law."

The power of the President to grant reprieves or to pardon does not extend to cases of impeachment.

§ 654. Effect of Dissolution of Congress.

Whether or not the dissolution of the House preferring the impeachment operates to terminate the charges made has not been determined, the occasion for the determination not having arisen. Reason and analogy with ordinary criminal proceedings and with English practice would seem to answer the question in the negative.

It is scarcely necessary to say that the proceedings and determinations of the Senate when sitting as court of impeachment are not subject to review in any other court.

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[5] But see the argument of the defense in the Swayne Trial, Sen. Doc. 194, 58th Cong., 2d Sess.

CHAPTER LVII.

THE ELECTION OF THE PRESIDENT AND VICE-PRESIDENT.

§ 655. The Executive Department.

The President and Vice-President are the only federal executive officers for whose selection and functions the Constitution makes direct provision, unless, indeed, one includes the Senate to which is intrusted participation in the executive functions of appointments and approval of treaties. That certain great executive departments should be legislatively established was taken for granted, as shown, for example, in the provision that the President "may require the opinion, in writing, of the principal officers in each of the executive departments, upon any subject relating to the duties of their respective offices;" and that the appointment of inferior officers may be by Congress vested in the "Heads of Departments."[1] From time to time these great executive departments, as well as certain "commissions" and other executive bodies not falling within any one of the "departments," have been created. The description of the organization and functions of these bodies does not fall within the scope of a treatise on constitutional law. We shall be concerned, however, with the manner in which all these executive agencies are integrated into one great system with the President at its head and with the extent of the directive power which the President may exercise over the civil and military service, and which the higher executive officials may exercise over their subordinates.

In the present chapter will be considered the qualification for the Presidency and the Vice-Presidency, and the constitutional provisions governing the selection of persons to fill these offices.

§ 656. Appointment of Presidential Electors; Plenary Powers of the States.

The Constitution provides that "Each State shall appoint, in such manner as the legislature thereof may direct, a number of

[1] Art. II, Sec. II, Cl. 1; Art. II, Sec. II, Cl. 2.

electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States shall be appointed as elector." [2]

It will be observed that the Constitution gives complete power to the States in the selection of presidential electors. The provision is that each State shall appoint, in such manner as the legislature thereof may direct. There is no requirement as to their election by the people. And, so plenary is the power thus given to the States in this respect, they may, if they see fit, as Representative Storrs once said, vest the appointment of electors in "a board of bank directors, a turnpike corporation, or a synagogue." [3]

As a matter of fact during the early years under the Constitution in many of the States presidential electors were not elected at all, but appointed by the legislatures, and this practice did not wholly disappear until quite recently. South Carolina practiced legislative appointment until 1860, and Colorado appointed in this manner in 1876.[4] At the present time, in all the States, the electors are chosen by popular ballot on a general ticket. It is, however, within the power of the States to provide for their election by districts, and this was done in Michigan in 1892. The constitutionality of this law was questioned in the Supreme Court of the United States, but was upheld by that tribunal in McPherson v. Blacker.[5]

In its opinion the court enter into an exhaustive historical review of the debate in the constitutional convention and of the practice of the States since the adoption of the Constitution, and show that the provision that "each State shall appoint" the electors, is to be construed as granting to each commonwealth plenary discretion as to the manner in which, and the agencies through which, these electors are to be selected. "If," declares the opinion, "the legislature possesses plenary authority to direct the manner of appointment, and might itself exercise the ap-

[2] Art. II, Sec. 1.

[3] Quoted by Dougherty, *The Electoral System of the United States*, p. 21.

[4] Finley, *The American Executive*, 332.

[5] 146 U. S. 1; 13 Sup. Ct. Rep. 3; 36 L. ed. 869.

pointing power by joint ballot or concurrence of the two houses, or according to such mode as designated, it is difficult to see why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket and not by districts. In other words, the act of appointment is none the less the act of the State in its entirety because arrived at by districts, for the act is the act of political agencies duly authorized to speak for the State, and the combined result is the expression of the voice of the State, a result reached by direction of the legislature, to whom the whole subject is committed."

As to the objection that the word "appoint" is not the most appropriate word to describe the result of a popular election, the court say: "Perhaps not; but it is sufficiently comprehensive to cover that mode, and was manifestly used as conveying the broadest power of determination."

. . . "In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States. They are, as remarked by Mr. Justice Gray in *Re* Green (134 U. S. 377, 10 Sup. Ct. Rep. 586, 33 L. ed. 951), 'no more officers or agents of the United States than are the members of the state legislatures, when acting as electors of federal senators, or the people of the states when acting as the electors of representatives in Congress.' Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States, but otherwise the power and jurisdiction of the State is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that congressional and federal influence might be excluded."

§ 657. Vacancies.

The States having plenary power over the appointment of electors may make provision by law for the contingency of an elector dying between the date of his appointment and the time for the casting of his vote, or by sickness or accident being prevented from voting. By an act passed March 1, 1792, Congress

§ 659. Twelfth Amendment.

The inadequacy of the original constitutional provisions for the election of the President and Vice-President early became manifest. John Adams became Vice-President in 1796 though he did not receive half the votes. In 1800 Jefferson and Burr received the same number of votes, and each a majority. There was no question, however, but that the electors desired that Jefferson should be President and Burr Vice-President; but, had it not been for the patriotism of Hamilton and a few other Federalists, Burr would have been selected President though he had not been the choice of probably a single elector for that office. This experience was sufficient to lead in 1804 to the adoption of the Twelfth Amendment, in substitution for clause 3 of Section I, of Article II.[7]

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the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.

[7] Art. XII. The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of government of the United States,

[illegible] leading to serious co[illegible] [illegible] declaration, it is to be observe[illegible] [illegible] and, therefore, who sh[illegible] [illegible] case there is questi[illegible] [illegible] In 1876, as is well know[illegible] [illegible] of which was contested, [illegible] the part of the Republicans [illegible] a Republican should [illegible] [illegible] however, asserted that the tw[illegible] [illegible] should perform this duty. As th[illegible] [illegible] of the lower House, and th[illegible]

[illegible] Senate:—The president of the Senate shal[illegible] [illegible] House of Representatives, open all the ce[illegible] [illegible] shall then be counted:—The person having the grea[illegible] [illegible] shall be the President, if such number b[illegible] [illegible] number of electors appointed; and if no person hav[illegible] [illegible] the persons having the highest numbers not exceed[illegible] [illegible] for as President, the House of Repre[illegible] [illegible] by ballot, the President. But in choosin[illegible] [illegible] shall be taken by States, the representation fro[illegible] [illegible] a quorum for this purpose shall consist of [illegible] [illegible] of the States, and a majority of all th[illegible] [illegible] to a choice. And if the House of Representative[illegible] [illegible] whenever the right of choice shall devolve upo[illegible] [illegible] of March next following, then the Vice-President [illegible] [illegible] of death or other constitutional di[illegible]

Republicans of the Senate, this would have meant a deadlock. The *impasse* was finally broken, as is well known, by the very doubtfully constitutional expedient of a special electoral commission to which all disputed cases should be submitted, the Congress being pledged to be guided by its decisions.

§ 661. Law of 1887.

By a law of February 3, 1887,[8] the whole matter of the election of the President is attempted to be regulated. By the first section the second Monday in the January succeeding their appointment is fixed for the meeting of the electors and the giving of their votes. The postponement from the date, formerly in force, namely, the first Wednesday in December, is to give the States full opportunity to determine any questions that may arise with reference to the appointment of their respective electors.

The second section of the act declares:

"If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for the final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determinations shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to the said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereafter regulated, so far as the ascertainment of the electors appointed by such State is concerned."

The effect of this section is, it will be seen, not to delegate to the States the counting of the electoral votes, but to determine what the two Houses of Congress, acting concurrently, will, under certain circumstances, consider conclusive evidence as to the regularity of the selection of the electors whose votes they are to count.

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[8] Stat. at L. 24. Chap. 90, p. 393.

[illegible]

[illegible] this section has been questioned upon [illegible] Professor Burgess has criticized it as [illegible] to the States.[1] "This language reveals [illegible] an excessively states-rights view of [illegible] Regarded from a purely scientific [illegible] consider the provision to be an ultra and an [illegible] to the States. No determination [illegible] should be made conclusive against the [illegible] Houses of Congress in the counting of the [illegible] the concurrent judgment of [illegible] Congress is the surest interpretation of [illegible] political system affords; and the [illegible] constitutional right to determine the legal [illegible] electoral vote sent to them under any form [illegible] State, on the ground that the Constitution [illegible] the appointment of the electors wholly in the State, con- [illegible] the appointment or election with that of [illegible] the power of counting of its most [illegible] the power of ascertaining what is to be [illegible]."

The [illegible] section of the act of 1887 has been criticized also [illegible] unconstitutional limitation upon the powers of the States. By what right, it was asked in Congress at the time [illegible] the law, may the federal legislature declare [illegible] the States must settle controversies with reference to the appointment of electors before a certain date? The States, it was [illegible] having absolute control of the appointment of the [illegible] may settle controversies, as to this, when and as they [illegible] and, therefore, it does not lie with the Houses of Congress [illegible] that they will not recognize the determinations of States made after a certain date. The answer made to this was [illegible] Congress in this section was not attempting to control the determination of these disputes by the States, but simply to state [illegible] it would receive as conclusive of a determination.

[1] [illegible] Science Quarterly, III. 633, "The Law of the Electoral Court."

The act goes on in section 3 to provide that the executive of each State shall, under the seal of the State, transmit to the Secretary of State of the United States a certificate showing what electors have been appointed, the votes cast for them, and, where there has been a controversy or contest, the manner in which settled. These certificates the Secretary of State is to publish in some newspaper, and at their first meeting send copies thereof to the two Houses of Congress. Each elector is also to be supplied with the same certificate, in triplicate, under the seal of the State. As determined by a previous law, one of these copies is to be sent by messenger to the President of the United States Senate at Washington, D. C., one to be forwarded to him by mail, and the third delivered to the judge of the district in which the electors assemble to cast their vote.[10]

Sections 4, 5 and 6 which regulate the counting by Congress of the electoral votes are given in the footnote below.[11]

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[10] Critics have pointed out that the act provides no means, if indeed it is constitutionally possible to provide means, for compelling the executives of the States to furnish these certificates. It has also been asked what is the object in providing the electoral returns in those cases in which the certificates are to be accepted as conclusive.

[11] "§ 4. That Congress shall be in session on the second Wednesday in February succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of one o'clock in the afternoon of that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A, and said tellers having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted in the manner and according to the rules in this act provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice-President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state

[illegible] of the act provides that the joint meeting of the two Houses [illegible] shall not be dissolved until the count of [illegible] shall be completed, and the result declared; and [illegible] shall be taken unless a question shall have arisen in [illegible] or otherwise under this act, [illegible] for either House, acting [illegible] provided, to direct a [illegible] the next calendar day, Sunday [illegible] in the forenoon. But if the [illegible] and the declaration of the result shall [illegible] before the fifth calendar day [illegible] of the two Houses, no further or other [illegible] shall be taken by either House."

[illegible] the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives [illegible] shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall [illegible] and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section three of this act from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section two of this act to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section two of this act, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its laws; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted

§ 663. Criticism of the Act of 1887.

This act in many respects embodies prior legislative practice, and is certainly founded upon the same constitutional theory as to the extent of the powers of Congress with reference to the subject. The act as it stands is, however, open not only to serious constitutional objections, but to the criticism that it leaves unsettled a number of points that in the future may easily lead to serious disputes.

The germ of the act of 1887 is to be found in the bill of 1800 which was discussed in Congress but never enacted, the two Houses failing to agree upon certain of its provisions. With reference to the powers of counting therein given to Congress, C. C. Pinckney, of South Carolina, raised the point of unconstitutionality.

"There is not," Pinckney said, "a single word in the Constitution, which can by the most tortured construction, be extended to give Congress, or any branch or part of our Federal Government, a right to make or alter the State Legislatures' directions.

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which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the Executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

"§ 5. That while the two Houses shall be in meeting as provided in this act the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw.

"§ 6. That when the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate."

[illegible]

last count of electoral votes in 1873. It was exercised by concurrent orders of the two Houses from 1793 to 1865, and by a standing joint rule in 1865, 1869, and 1873. Every counting at these twenty-one successive presidential elections has been conducted under and governed by the regulations thus imposed. These regulations have prescribed every step in the procedure; have defined and regulated the powers of every person who has participated in any ministerial service in the transaction. They have controlled every act of the president of the Senate in respect to the counting, except the single act of opening the packages of the electoral votes transmitted to him by the colleges, which is a special duty imposed on him by the Constitution. During all this long period, the exclusive jurisdiction of the two Houses, exercised upon numerous successive occasions, has never, in a single instance, been the subject of denial, dispute, or question.

The president of the Senate, although he has regularly, in person or by some substitute appointed by the Senate, performed the constitutional duty of opening the electoral votes, has never, on any occasion, or in any single instance, attempted to go a step beyond that narrow and limited function. . . . The two Houses have also asserted the right to prescribe a permanent method of counting the electoral votes."

With reference to those cases in which there has been received by Congress but one return of the votes of electors whose appointment has been lawfully certified according to Section 3 of the act, Section 4 provides that no vote or votes so cast "shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified."

As to this Senator Sherman objected. "That," he declared, "is a dangerous power. It allows the two Houses of Congress, which are not armed with any constitutional power whatever over the electoral system, to reject the vote of every elector from every State, with or without cause, provided they are in harmony in that matter."

"The language," comments Dougherty, "is none too strong. If a Congress, protected by an adequate vote in each chamber, wished to destroy the government, this provision would enable it to do so. It permits a majority, upon technical grounds, to defeat the popular will, to nullify constitutional government and prevent the inauguration of a new President." "The Section (4)," continues Dougherty, "clearly means that in case of such prior determination in the State (of controversies as to appointment of its electors) only the regularity of the votes given shall be questioned in the two Houses. But what shall happen to the vote of the State, if the two Houses do not separately agree that it has been regularly given? Is it to be lost? If so, the vote of a State is sure to be counted only when both Houses agree that it has been regularly given."

The subject of multiple returns is so well discussed by Dougherty that quotation is again justified.

"The subject of multiple returns," says Dougherty, "must be treated under several aspects. In the first place, if there has been a determination in a State of a contest over the appointment of electors, the votes regularly given by electors declared appointed by this determination are to be accepted by Congress, and the others discarded from consideration. In this single instance Congress renounces all right of inquiry into the state vote except to ascertain what votes have been regularly given, a field of inquiry that may cover electoral disqualifications and votes by eligible electors for unconstitutional candidates. If the two Houses do not separately concur that the votes are regular, state disfranchisement ensues.[14] In the second case, if conflicting state authorities or tribunals, two executives, for example, certify to different sets of electors, 'the votes regularly given of those electors, and those only, of such State shall be counted

[14] "It is not expressly stated in this period of the section that if the two Houses in separate assembly decide that such electors have not given their votes regularly, they may, by concurrent action, reject these votes, though it is to be presumed that such is the meaning of the law. The language of this paragraph is very confused, almost unintelligible; and since we have, as yet, had no actual precedents of interpretation, there are certain points concerning which our predictions cannot claim the attribute of certainty." Burgess, III, *Pol. Sci. Quar.* 643.

whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its laws.' In this class of cases the two Houses acting separately are given the power concurrently to decide upon the title of electors, as well as upon the regularity of their votes. And if they should fail to agree that a set of electors represents the State, there is no provision as to what shall happen, but presumably the vote of the State is to be sacrificed. Or, in the case under examination, after having agreed upon the title of the electors, the Houses may disagree as to whether the votes have been regularly given, in which event the State loses its vote. In questioning the title of electors, how far is the inquiry to go? The act does not fix limitations. Thus in this class of cases the State has two chances of disfranchisement. Here Congress arrogates a power of review of the decision of the state tribunal, and if the two Houses do not concur (which they would not, if of opposite political complexion) the vote of the State is lost. In this particular case, as Sherman pointed out in the Senate, Congress is given 'the power to exclude the vote of New York or any other State in the Union, not by the will of the two Houses, but by the veto of either House;' and, as he forcibly added, 'If the Senate should reject the vote of a State and thus secure a party advantage, the House could reject the vote of another State to secure a like advantage.'

"In the third case, where there has been more than one return but no decision by a state tribunal upon the appointment of electors, the State may be disfranchised through the failure of the two Houses to agree. The language is:

"'Those votes and those only shall be counted which the two Houses shall concurrently decide were cast by lawful electors, appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of the State. But if the two Houses shall disagree in respect to the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.'

"The two Houses may in this class of cases inquire whether the electors have been legally appointed and also whether their votes are lawful votes. If the two Houses disagree upon either proposition, the votes (the word 'lawful' is omitted before 'votes') of the electors who are fortified in their appointment by the certificate of the state executive are to be counted. In this one case of a double return, the difference of opinion between the two Houses will not lead to the rejection of the State's vote, if there is a certificate of the state executive as to the appointment of the electors. In the fourth case, the same broad powers are conferred upon the two Houses. Where there is more than one return from a State, in which there has been no determination of the question who are its electors, and neither of the rival sets of electors is furnished with the certificate of the executive, the two Houses may determine who are the lawful electors of the State, and the votes of such electors shall be counted, unless the two Houses by concurrent resolution decide that such electors have not given their votes regularly or lawfully." [15]

Among other questions left unsettled by the act are the following:

In case a constitutionally ineligible elector is voted for and elected, is he simply to be disregarded, and thus the State deprived of one of its electoral votes; or is the person receiving the next highest popular vote to be held elected?

The act does not provide how and under what circumstances the certificate of a governor may be impeached: Nor does it decide what shall be done if electors are by act of God prevented from voting on the date fixed, as happened in Wisconsin in 1857.

No provision is made for a chief executive in case neither President nor Vice-President is chosen by March 4. It has been suggested, however, that in case such an eventuality is foreseen the then President and Vice-President may resign, in which case, by the law of 1886, the Secretary of State would act as President until an election is had.[16]

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[15] Op. cit. 237ff.

[16] See Woodburn, *The American Republic*, 119.

CHAPTER LVIII.

PRESIDENTIAL SUCCESSION.

§ 664. Constitutional Provisions.

The Constitution provides that: "In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected."

§ 665. Act of 1792.

The act of March 1, 1792, relative to the election of the President and Vice-President also fixed the succession in case of the death, removal, resignation, or disability of these officers. It declared: "In case of removal, death, resignation or disability both of the President and Vice-President of the United States, the President of the Senate *pro tempore,* and in case there shall be no President of the Senate, then the Speaker of the House of Representatives for the time being shall act as President of the United States until the disability be removed or a President shall be elected."[1]

These sections of the act of 1792, though open to both constitutional and political objections, remained in force until 1886. These, among others, were the objections to the act. In the first place there is doubt whether the Speaker of the House and the President *pro tempore* of the Senate are "officers" of the United States and, therefore, qualified to succeed to the Presidency.

[1] A following section of this act makes provision for the appointment of electors for the selection of a new President and Vice-President whose terms of office when elected shall be four years commencing with March 4 succeeding the day on which the votes of the electors are given.

Madison made this point and also pointed out that in case either of these should succeed to the Presidency, they would still remain members of the legislative branch, and that the performance of executive functions would be in conflict with the exercise of their legislative duties.[2] Secondly, should both the President and Vice-President die during the interim between one Congress and the convening of the next, there would be no Speaker of the House, and there might not be a President *pro tem.* of the Senate.

In two instances this possibility has become an evident one. In 1881 before Congress met in the fall, and before a Speaker of the House or a President *pro tem.* of the Senate had been elected, President Garfield died and was succeeded by Vice-President Arthur. Again in 1885 Vice-President Hendricks died before the convening of Congress and before either a Speaker or President *pro tem.* of the Senate had been selected. Thus, in either of these cases had President Arthur or President Cleveland died, the office would have been left vacant without anyone designated by law to succeed to it.[3]

A third political objection to the presidential succession provided for by the act of 1792 was that it made it easily possible for the person succeeding to the presidency to be of a different political party from that to which the President whom he would succeed belonged.[4]

Still another objection to the act of 1792 was that it provided that a new election of a President and Vice-President should be held and that the persons so elected should hold office for four years. The effect of this would of course be that the presidential

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[2] Letter to Edward Pendleton, March 25, 1792.

It was probably due to the suspicion of the then Secretary of State, Jefferson, that the Federalists did not provide that that officer shall succeed in the case of the death, disability, or removal of both the President and Vice-President.

[3] The usual practice is for the Vice-President to absent himself for a day from the Senate called in extraordinary session after the inauguration of a new President, for action upon the cabinet and other nominations, so that opportunity may be given for the selection of a President *pro. tem.*, but this custom Vice-Presidents Arthur and Hendricks did not follow.

[4] Under this law had President Cleveland died he would have been succeeded by a Republican, Senator John Sherman or Senator John J. Ingalls.

elections would no longer occur in the years in which members of the House and one-third of the members of the Senate are selected.

Finally, there was room for doubt whether Congress had the constitutional power to provide for an intermediate election in case of the death, disability, or removal of both the President and Vice-President. That the Vice-President should, upon suceeding to the Presidency, serve out the remaining unexpired part of the term of his predecessor has not been questioned, the legislative power of Congress with reference to the Presidential succession being clearly limited to cases in which there is a vacancy in the offices of both President and Vice-President. In such cases the Constitution provides that Congress may by law provide for a successor to the President, who "shall act accordingly until the disability is removed, or a President shall be elected." Plainly there is here given no express power to Congress to provide for an intermediate election. On the other hand the words "until a President shall be elected" does not exclude the idea that intermediate elections may be held. At the time of the drafting of the Constitution it was at first moved that the person so selected should act "until the time of electing a President shall arrive." Madison objected to this that it would prevent an intermediate election, and thereupon the present phraseology was adopted.

This would seem to indicate that it was intended that Congress should have the power of ordering an intermediate election. But this is not conclusively established; for the convention struck out from the Constitution the proposal that the United States should have the power to emit bills of credit, and to make them legal tender, as well as the power to grant charters of incorporation, yet the authority to do these acts has been found elsewhere in the Constitution by the courts. So in the present case, the mere removal of an obstacle to the holding of an intermediate election, by striking out the provision that the acting President shall act "until the time of electing a President shall arrive," cannot be held in itself to confer the power in question upon Congress.

§ 666. Act of 1886.

In 1886 (January 19) was enacted the following law:

"*Be it enacted, etc.* . . . That in case of removal, death, resignation, or inability of both the President and Vice-President of the United States, the Secretary of State, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Treasury, or if there be none, or in the case of his removal, death, resignation, or inability, then the Secretary of War, or if there be none, or in case of his removal, death, resignation, or inability, then the Attorney-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Postmaster-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Navy, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Interior, shall act as President until the disability of the President or Vice-President is removed or a President shall be elected: *Provided,* That whenever the powers and duties of the office of President of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days' notice of the time of meeting.

"Sec. 2. That the preceding section shall only be held to describe and apply to such officers as shall have been appointed by the advice and consent of the Senate to the offices therein named, and such as are eligible to the office of the President under the Constitution, and not under impeachment by the House of Representatives of the United States at the time the powers and duties of office shall devolve upon them respectively."

By this measure, it will be seen that the Speaker of the House and the President *pro tem.* of the Senate no longer figure in the

succession, and, furthermore, that there is no longer, as there was in the act of 1792, a provision that an intermediate presidential election shall be held. There is a provision, however, that if Congress be not in session at the time of the happening of the vacancy or if in regular course it would not assemble within twenty days, then an extraordinary session shall be called.

As originally introduced by Senator Hoar, the bill had provided especially that the acting President should hold office for the balance of the unexpired term, but this provision was struck out. It is, therefore, apparent that by this action, or by providing that a Congress should be assembled, the intention of those who voted for the measure of 1886 was that Congress, if it should so see fit, might order an intermediate election. The act thus leaves it to the determination of each Congress, as the occasion may arise, whether or not such an election shall be held, or the acting President permitted to hold office for the unexpired portion of the presidential term.[5]

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[5] Politically this would seem to be a most unwise provision. As to this we would agree with the judgment of Mr. Hamlin who writes:

"The acting President, under the law, must call Congress together, and that body will then decide whether it deems a special election desirable and incidentally constitutional. If it decides in the affirmative, it will frame an act which may speedily oust the acting President from office. Such an act the acting President can veto, and if vetoed, the usual two-thirds vote will be necessary to overcome the veto. Even a death-blow might be administered by a pocket veto.

"It is not disputed that consequences disturbing to business and injurious to the prosperity of the country might follow under the act of 1792. I fear, however, that under the act of 1886 disturbance to business and injury to the prosperity of the country are to be feared almost as acutely, if of different kind. Let us suppose, for example, that a Republican President holds office but that the Republican party is in a minority both in the House and Senate. Such a condition existed under President Hayes in the 45th and 46th Congresses, and, the parties reversed, under President Cleveland in the 54th Congress. Let us further suppose that the Democratic majority wishes to reduce the custom duties; that the Republican President dies; that there is no Vice-President; that the Secretary of State succeeds as acting President, that the Democrats in Congress, believing that the people desire radical reduction of taxation, yet know that the acting President will veto a tariff reduction bill; and that they are confident that a Democratic President can be elected on this issue. Can any one doubt the inadvisability of

§ 667. Questions Undetermined.

A criticism that may be made both to the constitutional provision and to the acts of 1792 and 1886 is that the term "inability" to discharge the powers and duties of the presidential office is not defined. In the absence of a definition, who is to determine, and what conditions are to be held to create, an inability on the part of the President to perform his official duties? What is to be done in case the President is temporarily disabled by sickness or accident, or insanity? Who is to decide, and by what criteria when this disablement is so serious and so prolonged as to require the appointment of an acting President. For the two months preceding the death of Garfield the country had no President able to perform the duties of the Chief Executive.

One further point with reference to the succession to the presidency has been raised. In an interesting article in the *American*

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permitting an acting President to decide whether or not there shall be such a special election? If the acting President were to veto such a bill, it is to be feared that the majority in Congress might tie up the whole machinery of the government.

"Let us take another case. Suppose that a Republican President is in office, but that the Republican party is in a minority in one house and has a very slender majority in the other. This condition happened in 1881 under President Garfield. Let us further suppose that the President and Vice-President die; that the Secretary of the State succeeds to the Presidency and that he is bitterly opposed by many members of his party. Is it going too far to predict that the Democratic party might introduce a bill for a special election, knowing its ability to pass it in one house and relying upon assistance from enough members of the Republican party to carry it through the other? Is it not conceivable that the acting President might use all the patronage he controls to prevent the passage of such a bill? Is it not also possible that Congressmen (of course none in the present Congress) might couple requests for appointments of constituents with a gentle intimation that, if made, the acting President need not worry as to the fate of any bill providing for special election.

"It is hardly possible to overestimate the disturbance to the business interests of the country which might arise under such circumstances. The office of President would be held at the will of the legislative body. The power of the executive would be merged in that of Congress. Such a condition would be in hopeless conflict with the principles of the Constitution." *Harvard Law Review*, XVIII, 191, "The Presidential Succession Act of 1886."

Law Review,[6] the author, Mr. Lewis R. Works, points out that the language of the Constitution, strictly followed, would seem to point to, or at least render possible, the construction that upon the death, removal, resignation, or inability of the President, the Vice-President does not *become* the President, but simply that the powers and duties of the office "devolve" upon him. In Section III of Article I the Senate is authorized to choose a President *pro tempore* in the absence of the Vice-President "or when he shall exercise the office of the President of the United States," not when he shall become the President. This being so, in cases of disability of the President the Vice-President may by Congress be empowered not to *be President*, but to *act as* the President.

The uniform practice has been, however, since the time when Tyler took the oath of office on the death of Harrison, to consider the succeeding Vice-President as becoming the President. Under this practice, however, Mr. Work asks, what, in case of disability, does the late President become, and how, upon removal of his disability, would he again become President? Does the Vice-President cease, for the time being, to be Vice-President, or does he hold both offices?

§ 668. Third Term.

The Constitution provides that the President and Vice-President shall hold office for the term of four years. The proper length of term, and the propriety of forbidding re-election, were discussed in the Convention and the four-year period with eligibility to re-election finally agreed upon. Nothing is said in the Constitution as to the number of times the same person may be re-elected President, but, as is well known, the propriety of restricting the number of successive terms has become firmly rooted in the American mind.

With reference to this third term tradition one observation may perhaps be made. This is, that the doctrine is generally

[6] Vol. XXXVIII, 50. "The Succession of the Vice-President under the Constitution. An Interrogation."

considered to have been first stated by Washington in his "Farewell Address." It would appear, however, as the historian McMaster has pointed out,[7] that Washington did not there attempt to lay down a principle, but simply to explain that he did not feel that the then condition of the country required him to serve a third term. He says: "The acceptance and continuance hitherto in office, to which your suffrages have twice called me, have been a uniform sacrifice of inclination to duty, and to a deference to what appeared to be your wishes. . . . I rejoice that the state of your concerns, external as well as internal, no longer renders the pursuit of this inclination incompatible with the pursuit of duty or propriety." Jefferson was the first to decline a third term upon principle. Having been invited by a number of the States to stand for a third term he wrote (December 10, 1807): "That I should lay down my charge at a proper period is as much a duty as to have borne it faithfully. If some termination to the services of the Chief Magistrate be not fixed by the Constitution, or supplied by practice, his office, nominally four years, will in fact become for life; and history shows how easily that degenerates into an inheritance. Believing that a representative government responsible at short periods of election is that which produces the greatest sum of happiness to mankind, I feel it a duty to do no act which shall substantially impair that principle; and I should unwillingly be the first person who, disregarding the sound precedent set by an illustrious predecessor, should furnish the first example of prolongation beyond the second term of office."

From this time the propriety of principle was generally recognized. McMaster does indeed think that Jackson's popularity was great enough to have secured him a third term had he been willing to break the rule. As is well known strenuous but futile efforts were made to secure a third nomination for Grant.

How strong the sentiment might be to giving three or more terms to the same person, so long as not more than two are suc-

[7] In the chapter entitled "The Third Term Tradition" in the volume entitled *With the Fathers*.

cessive, has never been tested. President Roosevelt upon his election in 1905 declared that, in accordance with the spirit, if not the literal requirements, of the tradition against a third term, he would consider the three years which he served as the successor of McKinley as a first term for himself, and that he would not, therefore, be a candidate for renomination in 1908.

CHAPTER LIX.

THE POWERS AND DUTIES OF THE PRESIDENT.

§ 669. The Oath of Office.

Before entering upon the execution of his office, the President is constitutionally required to take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

The making of this oath or affirmation marks the induction into office. The requirement that it shall be taken is undoubtedly dictated by the belief that thus an additional moral obligation will be placed upon the one taking it. That it adds no new legal obligation would follow from the fact that, beyond doubt, were this oath or affirmation not required, the President like all other public officers would be equally liable for any misfeasance or nonfeasance of duty. It would seem equally true that the taking of this oath or affirmation, in pursuance of a constitutional requirement, confers no powers upon the President. Jefferson and Jackson, indeed, referred to this oath as supporting them in their contention that with reference to the performance of their constitutional duties they, as being sworn to support the Constitution, might interpret finally for themselves, the meaning of its provision; but their position was unquestionably a false one.

§ 670. Constitutional Powers of the President as Chief Executive.

By Section I of Article II, it is declared that "The executive power shall be vested" in the President. By Section III it is required that "he shall take care that the laws are faithfully executed." In ultimate resort, then, all federal executive authority is in the President, and upon him lies the responsibility for seeing that the laws of the United States are faithfully executed,

that is to say, that the armed and other forces of the Nation are, if necessary, employed to maintain in efficient operation the government of the United States over such districts as are under its sovereignty, and everywhere and under all circumstances, to protect its officers in the performance of their duties.

In fulfilment of the responsibility thus constitutionally imposed, the President has, by necessary implication, the authority to use all the specific powers conferred by the Constitution upon him. Chief of these is, of course, his authority as commander-in-chief of the land and naval forces of the Nation. He has also authority in many directions given him by statutes of Congress, with reference, for example, to the use of the militia, and to giving orders to subordinate executive officials.

Aside from these express powers, and those necessarily implied in them, the President has no other authority to act. That is to say, the obligation to take care that the laws of the United States are faithfully executed, is an obligation but confers in itself no powers. It is an obligation which is to be fulfilled by the exercise of those powers which the Constitution and Congress have seen fit to confer. At the time of the threatened resistance of the peoples of the Southern States to federal law in 1860, President Buchanan, under the advice of his Attorney-General, held himself practically powerless because of the lack of statutory authority to take the necessary steps. President Lincoln, upon his assuming office, gave a broader interpretation to existing laws conferring authority upon him, and Congress soon by statute, further increased his powers.

In earlier chapters has been shown how, by successive decisions of the Supreme Court, and by successive acts of Congress, the federal courts and the federal executive authorities have been empowered to extend full protection to all federal officials in the performance of their official duties, whether with reference to the punishment of those who have interfered with them, or the transference into federal courts, by habeas corpus, writs of error, or removal, cases in which federal officials accused of crime before state tribunals have set up, as a defense, that the act or acts with

the commission of which they are charged were perfomed in connection with the exercise of, and justified by their authority as federal officers.

§ 671. The Neagle Case.

In these ways Congress has by law provided means by which resistance to federal authority may be overcome or punished, and federal agents protected in the performance of their federal duties. In the case of *In re* Neagle,[1] however, the Supreme Court was led to take a position which in a measure at least departs from the principle which has been stated above, and recognizes in the President, acting through his Attorney-General, an authority to furnish a protection for which neither the Constitution nor act of Congress has made express provision. The court does in fact appeal to the obligation to take care that the laws are faithfully executed as a source of affirmative power.

In this case, decided in 1890, was involved not only a question of conflict between state and federal jurisdictions, but one as to the authority of the President of the United States, in default of statutory authorization, to depute to a United States marshal the specific duty of protecting a federal judge in the performance of his official duties. In this case, it will be remembered, Neagle had, under instructions from the Attorney-General of the United States, been deputized to guard Justice Field of the Supreme Court, while on circuit. In a railroad station in California Field was attacked by one Terry, whereupon Neagle shot and killed Terry. Upon being indicted on charge of murder in the courts of the State of California, Neagle set up the fact that he acted in the discharge of duties imposed upon him as a federal official and applied to a federal court for discharge upon habeas corpus. That court ordered his discharge and this judgment was approved by the Supreme Court of the United States.

After stating in its opinion that Justice Field was at the time of the killing of Terry engaged in the discharge of his duties,

[1] 135 U. S. 1; 10 Sup. Ct. Rep. 658; 34 L. ed. 55.

and, therefore, entitled to all the protection which the law could give him, the Supreme Court continued:

"It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties; and that the language of Section 753 of the Revised Statutes, that the party seeking the benefit of the writ of habeas corpus must in this connection show that he is 'in custody for an act done or omitted in pursuance of a law of the United States,' makes it necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an Act of Congress. It is not supposed that any special Act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits and act as a body-guard to them to defend them against malicious assaults against their persons. But we are of opinion that this view of the Statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of habeas corpus to persons imprisoned for the performance of their duty. And we are satisfied that if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited. This view of the subject is confirmed by the alternative provision, that he must be in custody 'for an act done or omitted in pursuance of a law of the United States or of an order, process or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or of a treaty of the United States.'

"In the view we take of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is 'a law'

ters. These aid him in the performance of the great duties of his office and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that 'he shall take care that the laws be faithfully executed.'

"Is this duty limited to the enforcement of Acts of Congress or of treaties of the United States according to their *express terms,* or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?"

"We cannot doubt," the opinion concludes, "the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection."

From this case it would appear that, under his general duty to take care that the laws of the United States be faithfully executed, the President has, aside from any special constitutional or congressional endowment, an authority to empower action to be taken, when circumstances seem imperatively to demand, for the due enforcement of the law or the due protection of federal rights, privileges or immunities. The force and earnestness of the dissenting opinion in this case would seem to indicate, however, that this general, one might almost say indefinite, power in the President, is one, the exercise of which may be justified only under exceptional circumstances. Certainly the doctrine declared in the Neagle case is not one upon which may safely be founded a general power in the President to supply means of enforcement of federal rights and modes of protection to federal officials where Congress has failed to act.[4]

[4] The dissenting opinion was prepared by Justice Lamar, Chief Justice Fuller concurring.

§ 672. The President as Administrative Chief.

The functions of a chief executive of a sovereign State are, generally speaking, of two kinds — political and administrative. In different countries, with different governmental forms, the emphasis laid respectively upon each of these functions varies. In some, the powers and influence of the executive head are almost wholly political. In others, as for example in Switzerland, the political duties of the executive are so fully under legislative control that the chief importance is upon the administrative side.

§ 673. Originally Intent That the President Should be Primarily a Political Chief: Congressional Control of Administration.

In the United States it was undoubtedly intended that the President should be little more than a political chief; that is to say, one whose functions should, in the main, consist in the performance of those political duties which are not subject to judicial control. It is quite clear that it was intended that he should not, except as to these political matters, be the administrative head of the government, with general power of directing and controlling the acts of subordinate federal administrative agents. The acts of Congress establishing the Departments of Foreign Affairs [State] and of War, did indeed recognize in the President a general power of control, but the first of these departments, it is to be observed, is concerned chiefly with political matters, and the second has to deal with the armed forces which by the Constitution are expressly placed under the control of President as Commander-in-chief. The act establishing the Treasury Department simply provided that the Secretary should perform those duties which he should be directed to perform, and the language of the act, as well as the debates in Congress at the time of its enactment, show that it was intended that this direction should come from Congress. Furthermore, the Secretary is to make his annual reports not to the President, but to Congress.[5] In similar manner, the Post-Office Department, when first permanently or-

[5] *Cf.* Goodnow, *American Administrative Law*, p. 78.

ganized in 1794, was not placed under the control of the President. The act gives in detail the duties of the Postmaster-General and there is no suggestion that in the exercise of these duties he is to be under other than congressional direction.

The constitutional power of Congress thus to assume direction of administrative departments of the Government received the approval of the Supreme Court in Kendall v. United States.[6] In that case the court say:

"The executive power is vested in a President, and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power. But it by no means follows that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not, and certainly cannot be claimed by the President. There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case where the duty enjoined is of a mere ministerial character."

The circuit court in this case had said:[7] "The legislature may prescribe the duties of the office at the time of its creation, or from time to time as circumstances may require. . . . As the head of an executive department, he (the Postmaster-General) is bound, when required by the President, to give his opinion in writing upon any subject relating to the duties of his office. The President in the execution of his duty to see that the laws be faithfully executed, is bound to see that the Postmaster-General discharges 'faithfully' the duties assigned to him by

[6] 12 Pet. 524; 9 L. ed. 1181.

[7] United States v. Kendall, 5 Cr. C. C. 163.

law, but this does not authorize the President to direct him how he shall discharge them."

§ 674. Development of the Administrative Powers of the President.

Despite this obvious original intention to confine the duties of the President mainly to the political field, the President has in practice become the head of the federal administrative system.[8] This has been due to two causes. In the first place the President's power of removal from office, a power which he may exercise at will, has easily enabled him to obtain administrative action even when he has not had legal power directly to command it. This was clearly shown in the episode of the removal of the bank deposits by Jackson. In the second place, the practical necessities of efficient government have compelled Congress to place in the President's hand powers of administrative discretion, and have inclined the courts to uphold his orders whenever it has been possible to do so.[9]

Even where the President has not the power to command, he has the constitutional right to "require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." [10]

Acting under his constitutional obligation to take care that the laws be faithfully executed, the President may take such steps as are necessary and the laws permit, to compel the proper performance of their respective duties by federal agents generally. This duty does not, however, make the President responsible for every act committed by a subordinate administrative official, nor, even where a duty is expressly laid upon him by the Constitution or by

[8] Not only this, but he has become the chief of his political party. For an account of the forces and manner by and in which this has been brought about see Macy, *Party Organization and Machinery in the United States;* and Ford, *Rise and Growth of American Politics.*

[9] See paper by Prof. James T. Young, "The Relation of the Executive to the Legislative Power" in *Proceedings of the American Political Science Association*, I, 47.

[10] U. S. Const., Art. II, Sec. II, § 1.

statute, is it necessary, or humanly possible, for him, in every case, to perform the duty in person.[11]

§ 675. President Acts Through the Heads of Departments.

In general the courts have recognized that the President acts through the chiefs of the Departments and that their acts are, in the view of the law, his acts. In proper cases, also, the acts of subordinate officials will be considered as the acts of a departmental head, and thus of the President.

By a law of 1806 the President was authorized to exempt certain lands from sale. In Wilcox v. Jackson[12] the court said with reference to a certain tract: "Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department in requiring this reservation to be made, as being in legal contemplation the act of the President; and, consequently, that the reservation thus made was, in legal contemplation, the act of the President; and, consequently, that the reservation thus made was, in legal effect, a reservation made by order of the President, within the terms of the act of Congress." [13]

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[11] In Williams v. United States (1 How. 290; 11 L. ed. 135) the court say: "The President's duty in general requires his superintendence of the administration; yet this duty cannot require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform. This cannot be, because if it were practicable, it would be to absorb the duties and responsibilities of the various departments of the Government in the personal action of the one chief executive officer. It cannot be, for the strongest reason, that it is impracticable—nay, impossible."

[12] 13 Pet. 498; 10 L. ed. 264.

[13] In Jones v. United States (137 U. S. 202; 11 Sup. Ct. Rep. 80; 34 L. ed. 691) the court say:

"The power conferred on the President of the United States by section 1

§ [illegible] Know When His Personal Judgment is Demanded

[illegible]

of the Act of Congress of [illegible], to determine that a guano island shall be considered as appertaining to the United States, being a strictly executive power, affecting foreign relations, and the manner in which his determination shall be made known not having been prescribed by statute, there can be no doubt that it may be declared through the Department of State, whose acts in this regard are in legal contemplation the acts of the President. Wolsey v. Chapman, 101 U. S. 755; 25 L. ed. 915; Runkle v. United States, 122 U. S. 543; 7 Sup. Ct. Rep. 1141; 30 L. ed. 1167."

In United States v. Eliason (16 Pet. 291; 10 L. ed. 968) the court say:

"The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation, and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority."

[14] 122 U. S. 543; 7 Sup. Ct. Rep. 1141; 30 L. ed. 1167.

personal judgment is required — as much so as if it would have been in passing upon the case, if he had been one of the members of the court martial itself. He may call others to his assistance in making his examination, and in informing himself what ought to be done, but his judgment when pronounced must be his own judgment and not that of another."

§ 677. Administrative Appeals.

The courts have laid down the general doctrine that where a power of supervision and direction is given to an administrative superior, this power may be exercised either by way of direct order, or by entertaining appeals from the acts of subordinates.

In Knight v. United States Land Association[15] the court, construing a law requiring that certain things be done under the direction of the Secretary of the Interior, quotes with approval the following from an opinion of the Secretary:

"The statutes in placing the whole business of the department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul, or affirm all proceedings in the department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the rights of the public and of private parties. Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the department the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the department in the despatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascer-

[15] 142 U. S. 161; 12 Sup. Ct. Rep. 258; 35 L. ed. 974.

direction, and, therefore, that there is no general right of appeal to them.

§ 678. Administrative Decentralization in the States

In general it may be said that the administrative systems of the States are much less centralized than that of the United States. As contrasted with the federal system the governors have no general powers of removal of public agents from office, nor are they given supervisory and directory power over the various administrative departments and boards of the state governments. Furthermore, each of these several departments and boards are thus not only not integrated into a single system under a single head, but each of them individually exhibit slight administrative integration.

§ 679. Increasing Integration of Federal Administration.

The federal administrative system has exhibited a steady increase in integration. In the earlier years subordinate administrative officials were accustomed to act in individual cases without feeling themselves bound to consult the judgment of those higher in office, nor did they hold themselves necessarily bound by directions from such source. The principle followed by them was that they, as well as those in higher position, derived their authority by direct grant from Congress and were subject to control and direction only by that body or by the courts. The necessities of efficient government have, however, compelled Congress to place express powers of control over their subordinates in the hands of administrative chiefs, and have persuaded the courts to recognize, whenever possible, the existence of these supervisory powers even where express statutory provision has not been made for their exercise. Professor Goodnow, commenting on this development, says: "At the present time the collectors of the customs would hardly think of attempting to apply a law in a doubtful case without first receiving instructions from the Secretary of the Treasury (Rev. St., § 2652) and the law makes an appeal from the collector of internal revenue to the Treasury Department neces-

Eliason[20] "the power to modify or repeal, or to create anew." This power to amend or repeal an order already issued and in force may not, however, be so exercised as to violate a vested right of an individual;[21] nor may a newly adopted administrative rule be made retroactive so as to impair private rights.[22]

It would appear, however, especially from the case of Dunlap v. United States[23] that the right of an individual to a privilege created by law may sometimes be defeated by the failure of the proper administrative office to make regulations determining the manner in which, and circumstances under which, the right in question may be enjoyed. It is possible, however, that this is true only in those cases in which it would appear that the legislature has vested the executive with discretionary power to determine when the circumstances are appropriate for granting the right in question. In the case referred to the court held that under an act of Congress which granted a rebate or repayment of tax on alcohol used in the fine arts by a manufacturer under regulations to be prescribed by the Secretary of the Treasury, no claim for such rebate could be made because the Secretary had not made any regulations for such use. The court in its opinion say: "It seems clear that when Congress undertook to provide for refunding the tax on alcohol when used in the arts, it manifestly regarded adequate regulations to prevent loss through fraudulent claims as an essential prerequisite, and may reasonably be held to have left it to the Secretary to determine whether or not such regulations could be framed, and, if so, whether further legislation would be required. It is true that the right to the rebate was derived from the statute, but it was the statute itself which postponed the existence of the right until the Secretary had prescribed regulations if he found it practicable to do so."

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[21] Campbell v. United States, 107 U. S. 407; 2 Sup. Ct. Rep. 759; 27 L. ed. 592.

[22] United States v. McDaniel, 7 Pet. 1; 8 L. ed. 587. *Cf.* Goodnow, *American Administrative Law*, 145.

[23] 173 U. S. 65; 19 Sup. Ct. Rep. 319; 43 L. ed. 616.

§ [illegible]. Power of the President to Control the Institution and Prosecution of Suits by the Department of Justice.

The power of the President to control the institution and continuance of suits by the Attorney-General and his assistants may seem to some an improper one, but its existence has been recognized since the foundation of the government. In [illegible] the Attorney-General declared that he "entertained no doubt of the constitutional power of the President to order the discontinuance of a suit . . . for it is one of the highest duties to take care that the laws be faithfully executed, and consequently that they may not be abused by any officer under his authority or control, to the grievance of any citizen." In [illegible] Taney, then Attorney-General, declared: "If it should be said that the District Attorney having the power to discontinue the prosecution, there is no necessity for inferring a right in the President to direct him to exercise it, I answer that the direction of the President is not required to communicate any new authority to the District Attorney, but to direct him in the execution of a power he is admitted to possess. The most valuable and proper measure may often be for the President to order the District Attorney to discontinue prosecution. The District Attorney might refuse to obey the President's order; and if he did refuse, the prosecution, while he remained in office, would still go on; because the President himself could give no order to the court or to the clerk to make any particular entry. He could act only through his subordinate officer, the District Attorney, who is responsible to him and who holds his office at his pleasure. And if that officer still continue a prosecution which the President is satisfied ought not to continue, the removal of the disobedient officer and the substitution of one more worthy in his place would enable the President through him faithfully to execute the law. And it is for this among other reasons that the power of removing the District Attorney resides in the President."[24]

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[24] *Op. Atty.-Gen.*, II, 482.

In United States v. San Jacinto Tin Co.[25] and United States v. Bell Telephone Co.[26] was upheld a general power of the Attorney-General and of his assistants, acting not in pursuance of any express statutory authority, but under their general powers as officers for the enforcement of the legal rights of the United States, to institute suits. In the first case the court say: "If the United States in any particular case has a just cause for calling upon the judiciary of the country, in any of its courts for relief . . . the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney-General of the United States. . . . We are not insensible to the enormous power and its capacity for evil thus reposed in that department of the Government. . . . But it has often been said that the fact that the exercise of power may be abused is no sufficient reason for denying its existence, and if restrictions are to be placed upon the exercise of this authority by the Attorney-General it is for the legislative body which created the office to enact them."

§ 683. Information to Congress.

The constitutional obligation that the President "shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient,"[27] has, upon occasion, given rise to controversy between Congress and the President as to the right of the former to compel the furnishing to it of information as to specific matters. As a result of these contests it is practically established that the President may exercise a full discretion as to what information he will furnish, and what he will withhold.[28]

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[25] 125 U. S. 273; 8 Sup. Ct. Rep. 850; 31 L. ed. 747.

[26] 128 U. S. 315; 9 Sup. Ct. Rep. 90; 32 L. ed. 450.

[27] U. S. Const., Art. II, Sec. III.

[28] In Field v. People (3 Ill. 79) the general question as to the right of a governor to refuse, at his discretion, to supply the legislature with information and papers demanded of him, was carefully considered by the court. In the course of its opinion the court say:

"The President may require the opinion of the heads of departments, their

[illegible] the administration of Cleveland a vigorous and long [illegible] was waged as to the right of the Senate or [illegible] to obtain from the office of the Attorney-General [illegible] in certain suspensions from office made [illegible] the law of 1867, as amended by [illegible] which placed various limitations upon [illegible] with respect to suspensions and re- [illegible] V. Duskin having been sus- [illegible] of the Senate, from the office of District [illegible] appointed as his successor, the [illegible] the nomination of Bur- [illegible] Committee called upon the At-

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[illegible] advice relative to the legality or policy of measures. In [illegible] or more, according to the difficulty [illegible] whether the consultation is separate, or in [illegible] confidential, and is so regarded, not [illegible] law use: for none of the officers or their clerks [illegible] required to give testimony of transactions, [illegible] confidential character. But neither in contemplation of law, [illegible] there any official confidential intercourse between the Governor [illegible] other officers of the executive departments. He may call [illegible] information relative to matters connected with their offices. [illegible] require of the Treasurer what amount of money is in [illegible] what amount of warrants are outstanding, and [illegible] what is the total and number of commissions to which he [illegible] whether the laws are all distributed, etc. These [illegible] matters, of reference to which there can be no secrecy, nor con- [illegible] relation to such that the Governor can require information. He has no right to the opinion or advice of the Secretary, as to [illegible] measures of any kind; and as all the duties of the [illegible] by law, and as it is only in relation to them that [illegible] to give information, there cannot, therefore, in the nature [illegible] any implication of confidence from communications relative to a [illegible] law or to matters of fact recorded for public information.

"The reasoning in favor of the Governor's authority to remove the Secretary, because of the latter's duty to register his official acts, can have no application to the Secretary of State: an officer whose office is created, and [illegible] duty to keep a register of the acts of the Governor is prescribed by the Constitution. In the performance of this, as of other duties, he does not act as the Governor's officer, subject to his control and direction, but as the officer of the Constitution, bound to the performance of such duties only as have been assigned by that instrument and the law."

torney-General to send to it all papers and information in the Department of Justice bearing upon the nomination of Burnett, as well as "all papers and information touching the suspension and proposed removal from office of George W. Duskin." To this request the following reply was given: "The Attorney-General states that he sends herewith all papers, etc., touching the nomination referred to; and in reference to the papers touching the suspension of Duskin from office, he has as yet received no direction from the President in relation to their transmission."

Previously to this the committees of the Senate had made requests for information upon the heads of various of the other departments, which requests had been refused at the direction of the President. The Senate now, January 25, 1886, however, as a body, and not through one of its committees, made a demand in the following terms: "Resolved, that the Attorney-General of the United States be, and he hereby is, directed to transmit to the Senate copies of all documents and papers . . . in relation to the conduct of the office of District Attorney of the United States for the Southern District of Alabama." To this demand the Attorney-General replied: "In response to the said resolution, the President of the United States directs me to say . . . that the papers and documents which are mentioned in the said resolution and still remaining in the custody of the Department, having exclusive reference to the suspension by the President of George M. Duskin . . . it is not considered that the public interests will be promoted by a compliance with the said resolution." Thereupon the Senate adopted a vigorous resolution of condemnation of the action of the President,[29] declaring it to be "in violation of his official duty and subversive of the fundamental principles of the Government, and of a good administration thereof." Accompanying this resolution a majority and minority report were made by the Judiciary Committee.[30]

On March 1, 1886, President Cleveland in a special message

[29] Feb. 18, 1886. Sen. Miscl. Doc. No. 74, 49th Cong., 1st Sess.

[30] Senate Report No. 135, 49th Cong., 1st Sess.

to the Senate argued at length the propriety and constitutionality of his position.

The constitutionality of his position would seem to be clear. The point has never been precisely passed upon in the courts, but in Totten v. United States[31] the court declared that an action against the Government in the Court of Claims upon a contract for secret services could not be maintained because "the secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery." The opinion then goes on to declare, *obiter,* "It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." [32]

§ 684. The President's Control of Foreign Relations.

In the chapter dealing with the Treaty-Making Power, the extent of the President's control of the foreign relations of the United States was fully considered.

§ 685. The Veto Power of the President.

The exercise by the President of the veto power has given rise to very few constitutional questions, and, where these have arisen, they have been considered, incidentally, elsewhere in this treatise.[33]

§ 686. The President's Pardoning Power.

The Constitution provides that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

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[31] 92 U. S. 105; 23 L. ed. 605.

[32] For a further discussion of this subject see speech of Senator A. O. Bacon, Jan. 13, 1909, Cong. Rec. vol. 43, p. 1011*ff*. See also debate in the Senate, March 3, 1909, Cong. Rec. vol. 43, p. 3813*ff*.

[33] Chapter XXXIX.

This pardoning power, like the veto power, has given rise to very few constitutional questions. It will be seen that the power is limited to offences against the United States. Cases of impeachment are expressly excepted from its reach, and we shall later consider whether it may extend to the remission of penalties imposed for civil contempts of court.

The effect of a pardon is to obliterate the offense, but it does not operate to impair the rights of others, as for example, to restore the offender's property which has been forfeited;[34] nor does it restore one *ipso facto* to a forfeited office.[35] Also, though the pardon takes away the guilt, it does not affect the *fact* of conviction of the crime, which fact may be later shown as bearing upon the offender's character.

The power to pardon includes the right to remit part of the penalty as well as the whole, and in either case may be made conditional. The power may be exercised at any time after the offense has been committed, that is, either before, during, or after legal proceedings for punishment.[36] General pardons, granting amnesty to classes of offenders, without naming them individually, may be granted.[37]

§ 687. The Pardoning Power May not be Limited by Congress.

The power is a purely discretionary one in the President, and, therefore, may not in any way be limited by Congress. In *Ex parte* Garland[38] the court say: "The power thus conferred is unlimited, with the exception stated (impeachments). It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken ordering their pendency, or after conviction and judgment. This power of the President is not subject to legislative control.

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[34] Osborn v. United States, 91 U. S. 474; 23 L. ed. 388.

[35] *Ex parte* Garland, 4 Wall. 333; 18 L. ed. 366.

[36] *Ex parte* Garland, 4 Wall. 333; 18 L. ed. 366.

[37] See *American Law Register*, VIII (1869), 512, 577, two articles entitled "The Power of the President to Grant a General Pardon or Amnesty for Offenses against the United States."

[38] 4 Wall. 333; 18 L. ed. 366.

Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions. . . . A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out the existence of the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense . . . there is only the limitation to its operation; it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction of judgment."

§ 688. Acts of Amnesty and Remission of Penalties.

Though Congress has thus no power to limit in any way the exercise of the pardoning power by the President, it may itself exercise that power to a certain extent, if exercised prior to conviction. Thus acts of amnesty have been held valid. In Brown v. Walker[39] the act of Congress granting immunity from prosecution to witnesses testifying before the Interstate Commerce Commission was upheld, the court saying: "Although the Constitution vests in the President power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment, this power has never been held to take from Congress the power to pass acts of general amnesty."

In Pollock v. Bridgeport S. B. Co.[40] it was held that the pardoning power of the President was not so exclusive as to prevent other officers, acting in conformity with statute, from remitting forfeitures and penalties incurred for the violation of laws of the United States. In its opinion the court say:

"It is not necessary to question the soundness of some of these propositions. It may be conceded that, except in cases of impeachment and where fines are imposed by a coördinate department of the government for contempt of its authority, the President, under the general qualified grant of power to pardon offenses against the

[39] 161 U. S. 591; 16 Sup. Ct. Rep. 644; 40 L. ed. 819.
[40] 114 U. S. 411; 5 Sup. Ct. Rep. 881; 29 L. ed. 147.

United States, may remit fines, penalties and forfeitures of every description arising under the laws of Congress; and, equally, that his constitutional power in these respects cannot be interrupted, abridged or limited by any legislative enactment. But is that power exclusive, in the sense that no other officer can remit forfeitures or penalties incurred for the violation of the laws of the United States? This question cannot be answered in the affirmative without adjudging that the practice in reference to remissions by the Secretary of the Treasury and other officers, which has been observed and acquiesced in for nearly a century, is forbidden by the Constitution. That practice commenced very shortly after the adoption of that instrument, and was perhaps suggested by legislation in England, which, without interfering with, abridging or restricting the power of pardon belonging to the Crown, invested certain subordinate officers with authority to remit penalties and forfeitures arising from violations of the revenue and customs laws of that country."

§ 689. Suspension of Sentences.

The power to suspend sentence, it has been held, is by the common law inherent in the judicial power, and its exercise, therefore, would not be in conflict with the executive power to grant reprieves and pardons, even were that power considered exclusive.

CHAPTER LX.

THE APPOINTMENT AND REMOVAL OF OFFICERS.

§ 690. Constitutional Provisions.

The Constitution provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

It is also provided that the President "shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session," and that he "shall commission all officers of the United States."

§ 691. "Officer" of the United States Defined.

The definition of the term "officer" of the United States has been determined in United States v. Germaine[1] and United States v. Mouat.[2] In the latter case the court say:

"What is necessary to constitute a person an officer of the United States, in any of the various branches of its service, has been fully considered by this court in United States v. Germaine, 99 U. S. 508; 25 L. ed. 482. In that case it was distinctly pointed out that, under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a department; and the heads of the departments were defined in that opinion to be what are now called the members of the

[1] 99 U. S. 508; 25 L. ed. 482.

[2] 124 U. S. 303; 8 Sup. Ct. Rep. 505; 31 L. ed. 463.

cabinet. Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States." [3]

The Constitution, it is seen, fixes absolutely the manner in which certain officers; namely, ambassadors, other public ministers and consuls, and judges of the Supreme Court, shall be nominated and appointed. The Constitution itself provides, in other clauses, for the selection of the President, the Vice-President, presidential electors, Senators, members of the House of Representatives, and the officers of the two Houses of Congress. In addition to these officers whose selection is thus constitutionally determined, it would appear that all other officers not properly to be styled "inferior" are to be nominated by the President and appointed by and with the consent of the Senate. The appointment of all other officers of the United States, not mentioned within the foregoing paragraph, is subject to regulation by law of Congress, at least to the extent that that body may determine whether they shall be appointed by the President with the approval of the Senate, or by the President alone, or by the courts of law or the heads of the departments.

§ 692. Inferior Officers.

The Constitution does not define the term "inferior officers," but it would appear that in this class are included all officers subordinate or inferior to those officers in whom other appointments may be vested.[4] The point has never been squarely passed upon by the court since Congress has never attempted to regulate the appointment to any but distinctively subordinate and inferior positions. Should it attempt to determine by law the appointment of heads of the great departments, or even of the heads of bureaus and divisions and commissions, or even of important local

[3] See *ante*, section 231 for further discussion of what constitutes an "office" within the meaning of the Constitution.

[4] Collins v. United States, 14 Ct. of Claims, 568.

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[1] 99 U. S. 508; 25 L. ed. 482.
[2] 124 U. S. 303; 8 Sup. Ct. Re[illegible]

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[illegible] ut duty of the [illegible] to be guided by

officers, such as revenue officers or postmasters in the larger cities, the constitutionality of the law would undoubtedly be subjected to judicial examination.

§ 693. Nominations.

With reference to the President's power of appointment it is to be observed that nominating, appointing, and commissioning to office are distinct acts.

The nomination is exclusively in the hands of the President. During the first years of the government the suggestion was several times made that the Senate might propose names for nomination to the President; but, whenever made, the suggestion was disapproved of as clearly not warranted by the Constitution. An appointment to office is not completed until signed by the President. Therefore, even after sending a nomination to the Senate and even after the approval of that body has been given, the President may, having changed his mind, refuse his signature to a commission. His signature having once been appended, however, the appointment is complete, and the delivery of the commission by the head of the appropriate executive department may be commanded by mandamus, provided, of course, a federal court has, by statute, been granted jurisdiction to issue the writ. This was determined in Marbury v. Madison.[5] In that case, after quoting the clauses of the Constitution conferring the appointing power, and the act of Congress, providing that the Secretary of State shall keep the seal of the United States and affix it to all civil commissions to officers of the United States appointed by the President, by and with the consent of the Senate, Marshall says:

"These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations: 1st. The nomination. This is the sole act of the president, and is completely voluntary. 2d. The appointment. This is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate. 3d. The commission.

[5] 1 Cr. 137; 2 L. ed. 60.

To grant a commission to a person appointed, might, perhaps, be deemed a duty enjoined by the constitution. 'He shall,' says that instrument, 'commission all the officers of the United States.'

"The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution." . . .

"This is an appointment made by the president, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment, though conclusive evidence of it. But at what stage does it amount to this conclusive evidence? The answer to this question seems an obvious one. The appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done everything to be performed by him.

"Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself, still it would be made when the last act to be done by the president was performed, or, at furthest, when the commission was complete.

"The last act to be done by the president is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an *inchoate* and incomplete transaction." . . .

"The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by

the will of the president. He is to affix the seal of the United States to the commission, and is to record it."

§ 694. Creation of Offices.

All offices are created either by the Constitution itself, or by Congress. The President, therefore, has not the power to create an office by directing some person to perform certain functions. However, the President as well as other executive officials may, for their assistance in executing their official duties, employ persons to perform certain specific duties. These persons have, however, legally speaking, no official powers, that is, they have no authority to issue orders to others, and for compensation for their services they must look either to contingent funds, the expenditure of which is placed in the discretion of the department employing them, or to a subsequent appropriation by Congress.

§ 695. Appointing Powers of Congress.

The Congress has no appointing power, beyond the selection of its own officers. It may create an office but not designate the one to fill it.

Congress, by acts passed in 1823, 1834, and 1849, directed the judge of the territorial court of Florida and the judge of the district court for the northern district of Florida to act as commissioners for the adjudication of claims arising under the Treaty of 1819 with Spain. This act was held unconstitutional in United States v. Ferreira[6] upon the ground that it attempted to impose the performance of administrative duties upon judicial officers, but the opinion further continues:

"A question might arise whether commissioners appointed to adjust these claims, are not officers of the United States within the meaning of the Constitution. The duties to be performed are entirely alien to the legitimate functions of a judge or court of justice, and have no analogy to the general or special powers ordinarily and legally conferred on judges or courts to secure the due administration of the laws. And, if they are to be regarded

[6] 13 How. 40; 14 L. ed. 42.

as officers, holding offices under the government, the power of appointment is in the President, by and with the advice and consent of the Senate; and Congress could not, by law, designate the persons to fill these offices. And if this be the construction of the Constitution, then as the judge designated could not act in a judicial character as a court, nor as a commissioner, because he was not appointed by the President, everything that has been done under the Acts of 1823, and 1834, and 1849, would be void, and the payments heretofore made, might be recovered back by the United States."

However, in a case where Congress had provided for a park commission and had provided that two of its members should be existing officers of the United States, the court said:

"It is pointed to as invalidating the act that while Congress may create an office, it cannot appoint the officer. As, however, the two persons whose eligibility it questioned were at the time of the passage of the act and of their action under it, already officers of the United States who had been heretofore appointed by the President and confirmed by the Senate, we do not think that because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted and it has frequently been the case, that Congress may increase the power and duty of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed."[7]

It has been held that Congress may authorize a particular person or official to perform a specific act, though it may not create an "office" for that person, in the sense that he is made an officer of the United States or entitled to any emolument or profit.[8]

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[7] Shoemaker v. United States, 147 U. S. 282; 13 Sup. Ct. Rep. 361; 37 L. ed. 170.

[8] See Kentucky v. Dennison (24 How. 66; 16 L. ed. 717), in which it was declared that Congress might authorize, though it could not compel, state officers to perform certain duties with reference to the interstate extradition of fugitives from justice.

§ 696. Appointing Power May be Vested Only as Provided by the Constitution.

The Congress may not vest the appointment of officers elsewhere than, as permitted by the Constitution, in the President alone, the President and the Senate or the heads of departments. In Ekiu v. United States[9] is said:

"It was argued that the appointment of Hatch was illegal because it was made by the Secretary of the Treasury, and should have been made by the superintendent of immigration. But the Constitution does not allow Congress to vest the appointment of inferior officers elsewhere than 'in the President alone, in the courts of law or in the heads of departments;' the Act of 1891 manifestly contemplates and intends that the inspectors of immigration shall be appointed by the Secretary of the Treasury; and appointments of such officers by the superintendent of immigration could be upheld only by presuming them to be made with the concurrence or approval of the Secretary of the Treasury, his official head."[10]

§ 697. Civil Service Requirements.

The question has been at times raised as to the constitutional power of Congress, while providing for the appointment of officials by the President, by and with the advice of the Senate, to require that the appointees shall be selected from certain classes of persons, namely, those who have satisfied specified educational and other tests applied by the Civil Service Commission. Though the courts have never had occasion to pass upon this point, the constitutionality of the provision would seem to be fairly certain. The same sort of rules have long been established and followed with reference to appointments in the army and navy, and the decisions of the state courts support the practice as to the appointment of state officials.

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[9] 142 U. S. 651; 12 Sup. Ct. Rep. 336; 35 L. ed. 1146.

[10] Citing U. S. Const., Art. II, Sec. II; United States v. Hartwell, 6 Wall. 385; 18 L. ed. 830; Stanton v. Wilkeson, 8 Ben. 357; Price v. Abbott, 17 Fed. Rep. 506.

§ 698. The Power of Removal.

Though the Supreme Court has never had occasion to pass squarely upon the point, executive practice, and, with the exception of the tenure of office acts of 1867 and 1869, Congressional enactment has sanctioned the view that the power to remove from federal office is constitutionally inherent in the President as to all offices to which he alone, or in conjunction with the Senate, appoints.[11]

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[11] This question was raised and ably discussed in the first Congress. In Parsons v. United States (167 U. S. 324; 17 Sup. Ct. Rep. 880; 42 L. ed. 185) the following summary of the discussion is given:.

"On May 19, 1789, in the House of Representatives, Mr. Madison moved: 'That it is the opinion of this committee that there shall be established an executive department, to be denominated the department of foreign affairs; at the head of which there shall be an officer to be called the secretary of the department of foreign affairs, who shall be appointed by the President by and with the advice and consent of the Senate; and to be removable by the President.' Subsequently a bill was introduced embodying those provisions. Mr. Smith of South Carolina said that 'he had doubts whether the officer could be removed by the President, he apprehended that he could only be removed by an impeachment before the Senate, and that being once in office he must remain there until convicted upon impeachment; and he wished gentlemen would consider this point well before deciding it.' (1st Lloyd's Cong. Reg., pp. 350, 351.) Then ensued what has been many times described as one of the ablest constitutional debates which has taken place in Congress since the adoption of the Constitution. It lasted for many days, and all arguments that could be thought of by men — many of whom have been instrumental in the preparation and adoption of the Constitution — were brought forward in the debate in favor of or against that construction of the instrument which reposed in the President alone the power to remove from office.

"After a most exhaustive debate the House refused to adopt the motion which had been made to strike out the words 'to be removed from office by the President,' but subsequently the bill was amended by inserting a provision that there should be a clerk to be appointed by the secretary, etc., and that said clerk, 'whenever said principal officer shall be removed from office by the President of the United States, or in any other case of a vacancy,' shall be the custodian of the records, etc., and thereupon the 1st clause, 'that the secretary shall be removable from office by the President,' was stricken out, but it was on the well-understood ground that the amendment sufficiently embodied the construction of the Constitution given to it by Mr. Madison and those who agreed with him, and that it was at the same time free from the objection to the clause so stricken out that it was itself susceptible to the objection of undertaking to confer upon the President a power which before he had not. The bill so amended was sent to the Senate, and

In *Ex parte* Hennen,[12] a case involving the validity of an appointment of a clerk of the district court of Louisiana by the district judge thereof, it was said by Mr. Justice Thompson, in speaking of the power of removal:

"In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of this government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate, jointly, to remove, where the tenure of the office was not fixed by the Constitution, which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution."

And in speaking of the different language employed in the act establishing the Navy Department from that which was used in regard to the Department of State, the learned justice further remarked: "The change of phraseology arose, probably, from its having become the settled and well-understood construction of the Constitution that the power of removal was vested in the President alone, in such cases, although the appointment of the officer was by the President and Senate."

In Marbury v. Madison[13] Chief Justice Marshall, in the course of his opinion, stated that: "Mr. Marbury, then, since his commission was signed by the President and sealed by the secretary

was finally passed after a long and able debate by that body, without any amendment on this particular subject. The Senate was, however, equally divided upon it, and the question was decided in favor of the bill by the casting vote of Mr. Adams, as Vice-President."

[12] 13 Pet. 230; 10 L. ed. 138.

[13] 1 Cr. 137; 2 L. ed. 60.

of state, was appointed; and as the law creating the office gave the officer the right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country."

Commenting upon this implication that this officer was not removable at the will of the President, the Supreme Court, in Parsons v. United States, say: "Whatever has been said by that great magistrate in regard to the meaning and proper construction of the Constitution is entitled to be received with the most profound respect. In that case, however, the material point decided was that the court had no jurisdiction over the case as presented. The remarks of the Chief Justice in relation to the right of an appointee to retain possession of an office created by Congress in and for the District of Columbia, as against the power of the President to remove him during the term for which he was appointed, are not necessarily applicable to the case of an officer appointed to an office outside of such district. In the District of Columbia Congress is given by the Constitution power to exercise exclusive legislation in all cases. U. S. Const. art. 1, § 8, subd. 17. The view that the President had no power of removal in other cases outside of the District, as has been seen, is one that had never been taken by the executive department of the government, nor even by Congress prior to 1867, when the first tenure of office act was passed. Up to that time the constant practice of the government was the other way, and in entire accord with the construction of the Constitution arrived at by Congress in 1789."

In this case of Parsons the question was presented whether the President had the power to remove from office, before the expiration of his term, a district attorney who had been duly appointed under an act of Congress which provided that "District Attorneys shall be appointed for a term of four years and their commissions shall cease and expire at the expiration of four years from their respective dates." The court held that, viewing the statute in the light of legislative and executive practice for more than a hundred years, it was not to be held that Congress had intended, by

fixing the term of office to four years, to limit the power of the President to remove before the expiration of that time.

The Tenure of Office Acts of 1867 and 1869, which were repealed in 1886, did, in express terms, limit the President's power of removal, but these acts were passed under peculiar conditions of strife between Congress and the President, they never were brought before the court for the determination of their constitutionality, and all the *dicta* of that court since uttered, would indicate a present opinion at least, that the acts were void, that, in short, Congress has not the constitutional power to limit the President's power of removal from office those whom he has alone, or with the advice and consent of the Senate, appointed.

In Reagan v. United States[14] it was implicitly held, however, that an officer appointed by the President by and with the advice and consent of the Senate under an act of Congress, is entitled to notice and a hearing before removal if by Constitution or statute causes for removal are specified, or the term of office fixed for a given period. In this case the court held that in fact Congress had not affirmatively specified any causes of removal, but intimated, as said, that had it done so, notice and hearing would have been necessary before removal.

In Shurtleff v. United States[15] the President's power of removal from office was again carefully considered. This case did not require the court to determine whether the President's power of removal was constitutionally exempt from the control of Congress, inasmuch as it held, by a rather strained construction, that when a federal officer has been removed from office by the President without notice or an opportunity to defend, it will be presumed that the removal was made from other causes than those specified by Congress, and that this being so, the officer so removed is not entitled to that notice and opportunity to defend to which he would have been entitled had his removal been based upon one of the causes specified by Congress as justifying removal. And, furthermore, it was necessarily held that the specification by Con-

[14] 182 U. S. 419; 21 Sup. Ct. Rep. 842; 45 L. ed. 1162.
[15] 189 U. S. 311; 23 Sup. Ct. Rep. 535; 47 L. ed. 828.

gress of certain causes for which removal may be made, is not to be construed as declaring, or attempting to declare, that removal shall not be made for such other reasons as to the President may seem sufficient.

§ 699. Congress May Regulate the Removal of Inferior Officers.

In United States v. Perkins[16] it was held that when Congress by law vests the appointment of inferior officers in the heads of departments, it may at the same time limit and restrict the power of removal. The opinion, quoting with approval the Court of Claims, declares: "We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict and regulate the removal by such laws as Congress may enact in relation to the officers so appointed. The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto. It follows that as the claimant was not found deficient at any examination, and was not dismissed for misconduct under the provisions of Revised Statutes, § 1525, nor upon and in pursuance of the sentence of a court-martial to that effect or in commutation thereof, according to Revised Statutes, § 1229, he is still in office and entitled to the pay attached to the same."

§ 700. Injunctions to Prevent Removal.

In White v. Berry[17] it was held that, in the absence, at least of express statutory authorization, the courts will not grant a writ of injunction to prevent the removal of an officer from the classified service, even though such removal be in violation of the rules

[16] 116 U. S. 483; 6 Sup. Ct. Rep. 449; 29 L. ed. 700.
[17] 171 U. S. 366; 18 Sup. Ct. Rep. 917; 43 L. ed. 199.

governing that service as laid down by the Civil Service Act and an executive order issued in pursuance thereof. In other words, it was held that from the general executive power of the President is implied a power of removal from office, and that under this general power he may issue rules for the government of the executive departments with reference to removals, but that these rules are not imposed upon the President by law or by the Constitution, and that, therefore, if they be violated by the executive chiefs, with the President's approval, the person so deprived of office has no legal right to reinstatement.

§ 701. Mandamus to Reinstate in Office.

In Keim v. United States[18] it was held that the action of the Secretary of the Interior in discharging a clerk in his department for incompetency was not subject to review in the courts either by mandamus to reinstate him or by compelling the payment to him of his salary. The court say:

"The appointment to an official position in the government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power.

"In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment. 'It cannot for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment.' *Re* Hennen, 13 Pet. 225; 10 L. ed. 136; Parsons v. United States, 167 U. S. 324; 17 Sup. Ct. Rep. 880; 42 L. ed. 185. Unless, therefore, there be some

[18] 177 U. S. 290; 20 Sup. Ct. Rep. 574; 44 L. ed. 774.

specific provision to the contrary, the action of the Secretary of the Interior in removing the petitioner from office on account of inefficiency is beyond review in the courts either by mandamus to reinstate him or by compelling payment of salary as though he had not been removed."

§ 702. NOTE.— *The Powers of Removal by State Governors.* From the foregoing pages it is seen to be established that the right of removal from office exists in the President unless taken away in plain and unambiguous language, and that it is by no means certain that it may be taken away even when such language is used. In the States, however, this doctrine does not apply to the governor. Here it has been generally held that he has no inherent powers of removal, in this respect the powers of the state executive contrasting with those of the federal executive in a manner similar to that in which the governor's powers of administrative control are contrasted with those of the President. This general contrast between the state gubernatorial and the federal presidential offices is well set out in the case of Field v. Illinois, 3 Ill. 79. The court there say:

"The reasoning in favor of the Governor's authority to remove the Secretary, because of the latter's duty to register his official acts, can have no application to the Secretary of State; an officer whose office is created, and whose duty to keep a register of the acts of the Governor is prescribed by the Constitution. In the performance of this, as of other duties, he does not act as the Governor's officer, subject to his control and direction, but as the officer of the Constitution, bound to the performance of such duties only as have been assigned by that instrument and the law.

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"The injunction, that the Governor shall see that the laws are faithfully executed, it is also urged, gives him the control, and consequently the power of removal of the officers of the executive department. This inference is not justified by the premises. It has neither the sanction of authority nor the practice of other State executives, both of which are opposed to it."

"As the right of appointment to office has not been given to the Governor as a general rule, as it has to the President, the analogy between their powers relied upon does not hold good; and whatever may be the theoretical or political denomination of this power under other governments, it cannot be considered an executive function under our Constitution, because it does not belong to the executive.

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"So diversified is the practice of the governments of the States, in reference to the appointment of officers, that no general rule can be deduced from it; certainly none to justify the assumption that it is an executive function. Under these governments, then, it is an executive, or legislative, or popular function or power, according as the respective constitutions have made it so.

"The disparity between the powers of the President and Governor is not greater in reference to appointment to office than it is in reference to their

supervision and control of the officers of the executive department, when appointed.

"The Constitution of the United States and of this State contain the same declarations that the executive powers of the government shall be vested in the respective executives; and in the Constitution of the first, this declaration is carried out by its other provisions. It creates no other officers in whom a portion of this power is vested or required to be vested by law. Those officers whom the President may remove are created by law, as aids and helps to him in the performance of his duties. But the declaration in our Constitution, that the executive power of the government shall be vested in the Governor, is to be understood in a much more limited sense; inasmuch as, by its other provisions, it is greatly circumscribed and narrowed down. Unlike the Constitution of the United States, ours has created other executive officers, in whom a portion of this power is required to be vested by law, not to be assigned by the Governor.

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"As, by the Constitution of the United States, the President has the control of the whole executive department, it having created no other officers in whom any portion is vested, or required to be vested by law; and as those who are to assist him in its administration are by law placed under his supervision and control, he thereby becomes politically responsible for its proper administration. This responsibility was strongly urged as a reason for giving him authority to remove those officers for whose conduct he was responsible.

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"Here, again, is a contrast, in place of an analogy, between the powers and responsibility of the executives of the two governments; and also between the character and accountability of the executive officers of the respective governments.

"The Governor is, neither in fact nor in theory, personally nor politically responsible for the official conduct of the Secretary, or any other officer. He cannot assign him the performance of a single duty or control him in the performance of those assigned by law. He does not move in the executive circle, as has been said, but in that marked out by the Constitution and by the law, separate, distinct from, and independent of, that of the Governor. He looks to the law for his authorities and duties, and not to the Governor; and to that, and that alone, he is responsible for their performance.

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"From this comparison between the powers of the President and Governor, and between the character, duties, and accountability of the officers, whom the President may remove, and the Secretary of this State, there is no similarity, so far as regards the decision of this case; and, by an examination of the debates of 1789, it will be seen that the concession to the President, of the power now claimed by the Governor, was made for reasons which cannot apply to it. Convenience and a supposed necessity may have had some influence, but, from the general scope and tendency of the arguments of the advocates of the President's power, there would seem to be no doubt that the concession was made because of the general grant to him of the executive

power; his entire control over, and responsibility for, the proper administration of the executive departments; and because of his right to prescribe the duties of the officers of the departments, and supervise and control them in the manner of their execution.

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"In every respect, then, in which I can view this case, I am constrained, according to the convictions of my mind, to say, that the Governor has no power under the Constitution to remove from office the Secretary of the State, at will and pleasure. No express grant of this power is to be found in the Constitution; nor can it be implied from any of its provisions. It is not a power necessary, as has been shown, to the exercise of any of the powers expressly delegated, or the performance of any of the duties enjoined upon the executive."

CHAPTER LXI.

MILITARY LAW.

§ 703. Military Powers of the General Government.

Under the Articles of Confederation the General Government had not been granted adequate military authority. To it had been conceded by the States the power to "build and equip a navy." But for its land forces it was obliged to rely wholly upon requisitions made upon the States, each State being pledged to supply a quota in proportion to the number of its white inhabitants. The regimental officers of these forces were appointed by the States, only the general officers being appointees of the General Government. From these quotas the national forces were supplied. Over the militia bodies of the several States, the General Government was given no control whatever.

Under the present Constitution, the Federal Government is given full power for the organization and maintenance of both naval and land forces of its own, and a considerable authority over the state militia forces. The constitutional clauses in which these powers are granted are as follows:

"The Congress shall have power to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

"To provide and maintain a navy;

"To make rules for the government and regulation of the land and naval forces;

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

"To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."[1] The second article of amendment to the Constitution provides that "A well-regulated militia, being necessary to the

[1] Art. I, Sec. VIII.

security of a free State, the right of the people to keep and bear arms shall not be infringed."

Other clauses of the Constitution give to the United States the power to exercise exclusive authority "over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings;" "To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;" and "To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."[2]

There is thus apparent the purpose to equip the National Government with adequate military authority to maintain itself against enemies both domestic and foreign. Upon the other hand, while the States are not deprived of military authority necessary to maintain domestic order or to protect themselves against invasion, the maintaining of armed forces for any other purpose, or the engaging in foreign war, or entering into alliances that may lead to war, is forbidden. By clause 3 of Section X of Article I it is declared: "No State shall, without the consent of Congress, lay any duty of tonnage, keep any ships-of-war, in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Section IV of Article IV declares that "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence."

§ 704. Military Law: With Reference to Members of the Army and Navy.

The Constitution provides, as has been seen, that Congress shall have the power to provide and to make rules for the government

[2] Art. I, Sec. VIII.

and regulation of the land and naval forces. It is also provided that the President shall be Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States."[3]

Under these grants of power, Congress has established an army and navy, and by laws, passed from time to time, has provided the rules by which the respective powers and duties of the officers and men constituting this military establishment are to be determined and exercised. Collectively these rules are known as the Military Laws of the United States.[4]

§ 705. Articles of War.

The chief of these military laws, so far as they relate directly to the duties and obligations of the individual soldier, are embodied in the so-called Articles of War, which constitute sections 1342 and 1343 of the Revised Statutes.[5]

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[3] Art. II, Sec. II, Cl. 1.

[4] The latest compilation of these rules is that prepared by the Judge-Advocate-General George B. Davis, under the direction of the Secretary of War, and published by the United States Government as House Document No. 545, Fifty-sixth Congress, second session.

[5] Historical note. The following historical note is taken from the compilation of the *Military Laws of the United States*, pp. 962–3:

"In the early periods of English history military law existed only in time of actual war. When war broke out troops were raised as occasion required, and ordinances for their government, or, as they were afterwards called, Articles of War, were issued by the Crown, with the advice of the constable or of the peers or other experienced persons, or were enacted by the commander in chief in pursuance of an authority for that purpose given in his commission from the Crown.

"These ordinances or articles, however, remained in force only during the service of the troops for whose government they were issued, and ceased to operate on the conclusion of peace. Military law in time of peace did not come into existence until the passing of the first mutiny act in 1689.

"The system of governing troops in active service by articles of war, issued under the prerogative power of the Crown, whether issued by the King himself, or by the commanders in chief, or by other officers holding commissions from the Crown, continued from the time of the Conquest till long after the passing of the annual mutiny acts, and did not actually cease till the prerogative power of issuing such articles was superseded in 1803 by a corresponding statutory power.

"The earlier articles were of excessive severity, inflicting death or loss of

With the details of this considerable body of statutory law we are not here concerned. With its general character, and especially with its relations to the other civil portions of the law of the land, we are, however, interested.

§ 706. Obligations Assumed by Enlistment.

By enrollment in the military forces of the United States, the individual assumes new obligations, and is subjected to certain

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limb for almost every crime. Gradually, however, they assumed something of the shape which they bear in modern times, and the ordinances or articles of war issued by Charles I in 1672 formed the groundwork of the Articles of War of 1878, which were consolidated with the mutiny act in the army discipline and regulation act of 1879, which was replaced by the army act of 1881. The army act of 1881, which now constitutes the military code of the British army, has of itself no force, but requires to be brought into operation annually by another act of Parliament, thus securing the constitutional principle of the control of the Parliament over the discipline requisite for the government of the army.

"The Rules and Articles of War [of the United States] were derived originally from the English mutiny act and articles of war under the following circumstances: In May, 1775, the Continental Congress met in Philadelphia and at once proceeded to levy and organize an army. A system of rules for its government was, of course, indispensable. The members of this Congress were naturally familiar with the English military code. The local troops serving with the English forces sent to this country in 1754 had been brought under the mutiny act, while the armies of Gage and Burgoyne were governed by the English code at the time the first 'Continental troops' were raised. It was but natural, therefore, that this body should turn to the mutiny act as a model, and on June 30, 1775, the Congress promulgated articles, 69 in number, for the government of the Continental troops. These articles were adopted from the English, in the same form as our present articles, modified, however, to meet the milder views which were entertained by a people who entertained an objection to a standing army. Additions were made in November of this year, but were repealed by the act of September 30, 1776, and new articles adopted. These articles, 102 in number, were modeled upon the British form and were arranged in 18 sections. With some modifications they remained in force until 1806.

"In September, 1789, they were formally recognized and adapted to the new Constitution by the First Congress of the United States. In 1806 the articles, 101 in number, were rearranged and promulgated by Congress; the divisions into sections were dropped and the old model substituted. These, with five or six modifications, remained in force for nearly seventy years, and were the governing code of the Army until the passage of the act of June 22, 1874. (18 Stat. at L. 113.) These articles are embodied in the Revised Statutes as sections 1342 and 1343 of that work."

forms of control to which he was not before subject. But he does not lose his right to the protection of the civil and criminal law, nor is he released from any of his obligations thereunder. Thus the enlisted soldier comes under an obligation to obey all the provisions of the military code, and for the violation of any one of them is subject to trial before a military court, a court-martial, and, upon conviction, to punishment ranging in severity from a small fine or short imprisonment to loss of life. In cases of urgency, which do not admit of delay, he may be summarily punished by order of his superiors, without even a court-martial being convened. Furthermore if the act for which he is tried, convicted and punished by the military authorities, is also an offense against the general law of the State in which he is, he may be tried, convicted and punished by the civil authorities of that State. Still further, as we shall see, if, in justification of his act, he sets up the command of his military superior, it must appear that that order was one which that officer had authority to give. Thus the soldier may at times find himself in the dilemma that if he refuse to obey the order of his military superior, he will receive immediate military punishment; whereas, if he obey it, he will later be held civilly and criminally liable in the ordinary courts. This dilemma, though easily conceivable, is not, in fact, often a serious one, for the soldier will not be held civilly and criminally responsible except in cases where he had grounds for knowing that the act ordered to be committed was not a proper one and not within the official power of his superior to command. The late Justice Stephen in his *History of the Criminal Law of England,* has stated the doctrine upon this point and the reasons for it, as follows:

"I do not think, however, that the question how far superior orders would justify soldiers or sailors in making an attack upon civilians has ever been brought before the courts of law in such a manner as to be fully considered and determined. Probably upon such an argument it would be found that the order of a military superior would justify his inferiors in executing any orders for giving which they might fairly suppose their superior officer to

have good reasons. Soldiers might reasonably think that their officer had good grounds for ordering them to fire into a disorderly crowd which to them might not appear to be at that moment engaged in acts of dangerous violence, but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street when no disturbance of any kind was either in progress or apprehended. The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior. I think it is not less monstrous to suppose that superior orders would justify a soldier in the massacre of unoffending civilians in time of peace, or in the exercise of inhuman cruelties, such as the slaughter of women and children, during a rebellion. The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds. The inconvenience of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each other, is an inevitable consequence of the double necessity of preserving on the one hand the supremacy of the law, and on the other the discipline of the army."[6]

But, just as the individual soldier is still answerable in all respects to the non-military law of the State, so are his superiors when giving commands, as are also the members of courts martial and of other military tribunals, when trying him, and the persons by whom the orders of such tribunals are carried into effect; and if any act is by them ordered or committed which is not warranted by the law of the land, they may be held civilly and criminally responsible by the ordinary courts. Not even the order of the President himself, the constitutional commander-in-chief of the army and navy, if that order be without authority of law, is sufficient to justify the performance of the act commanded. This principle is excellently illustrated in the case of

[6] Op. cit. I, 205.

Little v. Barreme[7] which was an action in trespass against a naval officer who had seized the plaintiff's ship in obedience to an order of the President, which order was, however, based upon a misinterpretation by him of an act of Congress. In rendering his opinion, Chief Justice Marshall said:

"I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between the acts of the civil and those of military officers; and between proceedings within the body of the country and those on the high seas. The implicit obedience which military men usually pay to the orders of their superiors, and which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them and who is placed by the laws of his country in a situation which in general requires that he should obey them. . . . But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in the opinion of my brethren, which is that the instructions cannot change the nature of the transaction, or legalize an act which without them would have been a plain trespass."

§ 707. Powers of the Military Commander.

In time of war, as we shall see, the powers of the military commander, in the control of his own men, and of the citizens of the State to which he belongs, are much broader than they are in time of peace, but it is still true that they are subject to the limitations which the civil law imposes. With respect to the persons and property of the enemy, however, he is subject only to the limitations which the laws of war, as determined by international usage, supply, and for violation of these he is responsible only to the military tribunals.

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[7] 2 Cr. 170; 2 L. ed. 243.

§ 708. Courts Martial.

The tribunals in which those who violate the military law are commonly tried (except where urgency demands a more summary method) are termed courts martial. Article 64 of the Articles of War provides:

"The officers and soldiers of any troops, whether militia or others mustered and in pay of the United States, shall at all times and in all places be governed by the Articles of War and shall be subject to be tried by courts martial."

General courts martial consist of any number of officers from five to thirteen, but not of less than thirteen except when to convene that number would be manifestly injurious to the service.[8]

Commissioned officers are triable only before these general courts martial, and, when it can be avoided, the officers composing the court are not to be inferior in rank to the accused.

For the trial of enlisted men for certain offenses summary courts, composed of one officer, appointed by the commanding officer, are provided.[9] There is also provision made for garrison courts martial consisting of three officers for the trial of offenses not capital.

These military tribunals are presided over, as said, by officers detailed for the purpose. No provision is made either for presentment or indictment by jury. The constitutionality of this is expressly provided for by the Fifth Amendment to the Constitution which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." There is no constitutional necessity for a trial jury in courts martial for the reason that these courts are not federal judicial tribunals, and, therefore, no more than territorial courts, are within the application of the Sixth Amendment to the Constitution.

Courts martial are, in fact, agencies of the Executive.

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[8] Art. 75 of the Articles of War.

[9] Art. 79, Articles of War.

§ 709. Powers of Courts Martial; Jurisdiction of Civil Courts to Review Proceedings of.

A leading case fixing the constitutional status of courts martial is Dynes v. Hoover,[10] decided in 1858. This was an action of trespass and false imprisonment brought by the plaintiff, lately a seaman in the United States navy. The defendant pleaded that the imprisonment was by the authority of a naval general court martial convened under an act of Congress. The plaintiff demurred to the plea on the ground that the court martial had been without jurisdiction. Justice Wayne, delivering the opinion of the Supreme Court, after referring to the various constitutional provisions, said:

"These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations, and that the power is given without any connection between it and the third article of the Constitution defining the judicial power of the United States, indeed, that the powers are entirely independent of each other. . . . With the sentences of courts martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the Rules and Articles of War, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts. But we repeat if a court martial has no jurisdiction over the subject-matter of the charge it has been convened to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action of a party aggrieved by it, inquire into the want of the court's jurisdiction, and give him redress."

[10] 20 How. 65; 15 L. ed. 838.

From this decision it appears that, when acting within their jurisdiction, both as to the parties and to the subject-matter, courts martial are not subject to the jury provision of the Constitution, which apply only to the federal judiciary proper, nor are their decisions subject to review by the civil courts. In assuming jurisdiction, however, they, in a sense, act at their peril, for this question may be examined into by the civil courts, and if no jurisdiction is found, all acts committed by them are trespasses, punishment and damages for which the civil courts will award and the executive officers enforce.

In Tarble's case,[11] decided in 1872, was examined the right of a state court by writ of habeas corpus to inquire whether an individual was a member of the United States army and navy and, therefore, subject, as such, to federal military law. The court deny this right, and assert that this was a question exclusively for the federal civil courts to determine.[12]

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[11] 13 Wall. 397; 20 L. ed. 597.

[12] "The important question is presented by this case, whether a state court commissioner has jurisdiction, upon habeas corpus, to inquire into the validity of the enlistment of soldiers into the military service of the United States, and discharge them from such service when, in his judgment, their enlistment has not been made in conformity with the laws of the United States. The question presented may be more generally stated thus: whether any judicial officer of a State has jurisdiction to issue a writ of habeas corpus, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that Government. For it is evident if such jurisdiction may be exercised by any judicial officer of a State, it may be exercised by the Court Commissioner within the county for which he is appointed; and if it may be exercised with reference to soldiers detained in the military service of the United States, whose enlistment is alleged to have been illegally made, it may be exercised with reference to any other department of the public service when their illegal detention is asserted. It may be exercised in all cases where parties are held under the authority of the United States, whenever the invalidity of the exercise of the authority is affirmed. The jurisdiction, if it exist at all, can only be limited in its application by the legislative power of the State. It may even reach the parties imprisoned under sentence of the National Courts, after regular indictment, trial and conviction, for offenses against the laws of the United States. As we read the opinion of the Supreme Court of Wisconsin in this case, this is the claim of authority asserted by that tribunal for itself and for the judi-

§ 710. Jurisdiction of Courts Martial Over Offenses Which Are also Violations of the Local Civil Law.

In Coleman v. Tennessee[13] the court say: "We do not call in question the correctness of the general doctrine . . . that the

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cial officers of that State. It does, indeed, disclaim any right of either to interfere with parties in custody, under judicial sentence, when the National Court pronouncing sentence had jurisdiction to try and punish the offenders; but it asserts, at the same time, for itself and for each of those officers, the right to determine, upon habeas corpus, in all cases, whether that court ever had such jurisdiction."

After referring to the position taken by the Supreme Court in Ableman v. Booth (21 How. 506; 16 L. ed. 169) Justice Field continues:

"Among the powers assigned to the National Government, is the power 'to raise and support armies' and the power 'to provide for the government and regulation of the land and naval forces.' The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any state authority, how the armies shall be raised; whether by voluntary enlistment or forced draft; the age at which the soldier shall be received, and the period for which he shall be taken; the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offenses, and prescribe their punishment. No interference with the execution of this power of the National Government of its armies by any state officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service. Probably in every county and city in the several States there are one or more officers authorized by law to issue writs of habeas corpus, on behalf of persons alleged to be illegally restrained of their liberty; and if soldiers could be taken from the army of the United States and the validity of their enlistment inquired into by any one of these officers, such proceeding could be taken by all of them and no movement could be made by the national troops without their commanders being subject to constant annoyance and embarrassment from this source. The experience of the late rebellion has shown us that, in times of great popular excitement, there may be found in every State large numbers ready and anxious to embarrass the operations of the Government and easily persuaded to believe every step, taken for the enforcement of its authority, illegal and void. Power to issue writs of habeas corpus for the discharge of soldiers in the military service in the hands of the parties thus disposed, might be used, and often would be used, to the great detriment of the public service. In many exigencies the measures of the National Government might in this way be entirely bereft of their efficacy and value. An appeal in such cases to this court, to correct the erroneous action of these officers, would afford no adequate remedy. Proceedings on habeas corpus are summary, and the delay incident to bringing the decision of a state officer, through the

same act may, in some instances, be an offense against two governments, and that the transgressor may be held liable to punishment by both when the punishment is of such a character that it can be twice inflicted, or by either of the two governments if the punishment, from its nature, can be only once suffered. It may well be that the satisfaction which the transgressor makes for the violated law of the United States is no atonement for the violated law of Tennessee."

It is clear that there is here opportunity for conflict between the military and civil powers. Congress, however, has provided against these contingencies by giving the precedence in such cases to the civil courts. The 59th Article of War declares: "When any officer or soldier is accused of a capital crime, or of any offense against the person or property of any citizen of the United States, which is punishable by the laws of the land, the command-

highest tribunal of the State, to this court for review, would necessarily occupy years, and in the meantime, where the soldiers were discharged, the mischief would be accomplished. It is manifest that the powers of the National Government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty."

Chief Justice Chase, dissenting, said:

"I cannot concur in the opinion just read. I have no doubt of the right of a state court to inquire into the jurisdiction of a federal court upon habeas corpus, and to discharge when satisfied that the petitioner for the writ is restrained of liberty by the sentence of a court without jurisdiction. If it errs in deciding the question of jurisdiction, the error must be corrected in the mode prescribed by the 25th section of the Judiciary Act; not by denial of the right to make inquiry.

"I have still less doubt, if possible, that a writ of habeas corpus may issue from a state court to inquire into the validity of imprisonment or detention, without the sentence of any court whatever, by an officer of the United States. The state court may err; and if it does, the error may be corrected here. The mode has been prescribed and should be followed.

"To deny the right of state courts to issue the writ, or, what amounts to the same thing, to concede the right to issue and to deny the right to adjudicate, is to deny the right to protect the citizen by habeas corpus against arbitrary imprisonment in a large class of cases, and, I am thoroughly persuaded, was never within the contemplation of the Convention which framed or the people who adopted the Constitution. That instrument expressly declares that 'the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it.'"

[13] 97 U. S. 509; 24 L. ed. 1118.

ing officer and the officers of the regiment, troop, battery, company and detachment, to which the person so accused belongs, are required, except in time of war, upon application duly made by or on behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him in order to bring him to trial. If upon such obligation any officer refuses or wilfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service."

This article has been interpreted a number of times by the opinions of the Judge-Advocate-General of the United States, and the following principles laid down.

The article includes offenses committed by soldiers against municipal ordinances or by-laws. But it applies only to criminal charges. It does not extend to subpœnas summoning soldiers as witnesses in the civil courts though, as a matter of comity, commanding officers will always give their men permission to obey such mandates.

The 59th Article refers only to soldiers within the immediate control of the military authorities. Soldiers absent on leave or furlough may be arrested like any other citizens. It does include, however, offenses committed by soldiers before they came under the orders of the particular officer upon whom the demand by the civil authorities is made — even offenses committed by the soldier before enlistment. It does not apply to civilians resident or employed upon military premises. These may be summarily seized by the civil authorities, though comity requires that even in such cases notice be given to the commanding officer.

The two classes of tribunals should take care not to come into conflict in the performance of their duties. If an act committed by a soldier is an offense against both the civil and the military law, that authority which first assumes jurisdiction over him retains it until the end, and the other should await the results of its operations and judgment. Thus, the 59th Article does not, in general, require the surrender to the civil authorities of a soldier under

confinement by order of a court martial. Likewise a soldier released on bail by a civil court should not be tried by a court martial unless this can be done and punishment inflicted in such a manner as not to interfere with the proceedings in the civil court. But when sentence is completed in one court, the prisoner is then liable in the other, and his former trial and conviction is no defense.

Finally the 59th Article does not apply in time of war except in the discretion of the commanding officer upon whom demand is made. As a matter of fact, however, it may be noted that during the Spanish-American War, in 1898, an officer in the United States volunteers was actually given up to the civil authorities upon a charge of forgery.

§ 711. The Power of Congress to Vest in Military Tribunals Exclusive Jurisdiction over All Offenses Committed by Military Persons, Including Offenses Which Are also Crimes Against the Civil Law.

There is an *obiter dictum* upon this point in Coleman v. Tennessee.[14] The point directly decided in that case was that a certain section (30) of the Enrollment Act had not, as a matter of fact, made the jurisdiction of the military tribunals over certain offenses committed by soldiers in the army exclusive of the state courts. But after deciding this in the negative the court add: "We do not mean to intimate that it was not within the competence of Congress to confer exclusive jurisdiction upon military courts over offenses committed by persons in the military service of the United States. As Congress is expressly authorized by the Constitution 'to raise and support armies' and to 'make rules for the government of the naval and land forces,' its control over the whole subject of the formation, organization and government of the national armies including therein the punishment of offenses committed by persons in the military service, would seem to be plenary. All we now affirm is, that by the law

[14] 97 U. S. 509; 24 L. ed. 1118.

to which we are referred, the 30th section of the Enrollment Act, no such exclusive jurisdiction is vested in the military tribunals." The court then go on to state that no reasons of public policy required such exclusive jurisdiction in the military tribunals, that such an interpretation of the enrollment act was not necessary for maintaining the efficiency of the army, since the courts could not take persons from the military service without the consent of the military authorities.

Some light is also thrown upon the subject by the case of *Ex parte* Mason,[15] decided in 1882. Mason was a sergeant of artillery in the army of the United States. While on guard duty at the United States jail in Washington, he wilfully and maliciously and with intent to kill, discharged his musket through a cell window at a prisoner in the jail. He was court martialed and sentenced to be dishonorably discharged from the army, "and then to be confined at hard labor in such penitentiary as the proper authorities may direct for eight years." Mason petitioned for writs of habeas corpus and certiorari. The Supreme Court doubted if it had jurisdiction to issue such a writ, "inasmuch as it has no power to review the judgments of courts martial." "We all agree, however," the court continue, "that if a writ might issue there could be no discharge under it if the court martial had jurisdiction to try the offender for the offense with which he was charged, and the sentence was one which the court could, under the law, pronounce." Commenting upon the 59th Article of War, the court say: "It is not pretended that any application was ever made under this article for the surrender of Mason to the civil authorities for trial. So far as appears, the person injured by the offense committed was satisfied to have the offender dealt with by the military tribunals. The choice of the tribunal by which he is to be tried has not been given to the offender. He has offended both against the military and the civil law. As the proper steps were not taken to have him proceeded against by the civil authorities, it was the clear duty of the military to bring him to trial under that jurisdiction. Whether after

[15] 105 U. S. 696; 26 L. ed. 1213.

trial by the court martial he can again be tried in the civil courts, is a question we need not now consider. It is enough if the court martial had jurisdiction to proceed, and what has been done is within the powers of that jurisdiction."

The court then go on to hold that the court martial had power to pass the sentence, citing the 97th Article of War, providing that no court martial shall sentence a person to imprisonment in the penitentiary unless by some statute law, state or federal, or by the common law, in force where the offense was committed, the offender would have been subject to such imprisonment. The court continue: "When the act charged as 'conduct to the prejudice of good order and military discipline' is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear a court martial is authorized to inflict that kind of punishment. The act done is a civil crime and the trial is for that act. The proceedings are had in a court martial because the offender is personally answerable to that jurisdiction. . . . The 62d article provides that the offender, when convicted, shall be punished at the discretion of the court, and the 97th article does no more than prohibit the court from sentencing to imprisonment in a penitentiary in cases where, if the trial had been had for the same act in the civil courts, that could not be done."

The question raised by the Supreme Court in this Mason case whether there might not be cases in which the correction and punishment at the hands of the military power of an offense which is also an offense against the local civil law might be a bar to further criminal proceedings in the civil courts, appears to the writer one which it was improper to raise in a speculative way, for the doctrine cannot be doubted that, so long as Congress has not made the military jurisdiction exclusive, the local civil courts have the right and authority to punish all violations of the laws which they are established to interpret and apply. It is true that this doctrine, as suggested in the Mason case, renders possible a second punishment where the first had been a sufficient vindication of the law. But courts, both military and civil, are to be presumed

to strive to do substantial justice, and, therefore, they may be expected when called upon to impose a second penalty to consider the severity of the punishment already endured. As the Supreme Court has itself many times said, the mere possibility of a misuse of power is not a conclusive or even presumptive argument against its existence.

Whether or not, however, Congress has the constitutional power, except in time of war, to render the jurisdiction of military tribunals exclusive, as indicated *obiter* in Coleman v. Tennessee, would seem to be more doubtful; and when, if ever, that question is squarely presented to the Supreme Court, that tribunal may consider more carefully the possibility of the exaltation of the military over the civil authorities implicit in its *obiter dictum* in the Coleman case.

§ 712. Powers of Military Tribunals in Times of War.

In time of war, and especially upon the actual theatre of war, military courts have, without express legislative authorization, exclusive jurisdiction over the members of the military forces. As the court say in Coleman v. Tennessee:[16] "In denying to the military tribunals exclusive jurisdiction under the section of the law of Congress in question, over the offenses mentioned, when committed by persons in the military service of the United States and subject to the Articles of War, we have reference to them when they were held in States occupying, as members of the Union, their normal and constitutional relations to the Federal Government, in which the supremacy of that government was recognized, and the civil courts were open and in the undisputed exercise of their jurisdiction. When the armies of the United States were in the territory of insurgent States, banded together in hostility to the national government and making war against it, in other words, when the armies of the United States were in the enemy's country, the military tribunals mentioned had, under the laws of war and the authority conferred by the section named, exclusive jurisdiction to try and punish offenses of every grade committed by persons in the military service. Officers and soldiers

[16] 97 U. S. 509; 24 L. ed. 1118.

of the armies of the Union were not subject during the war to the laws of the enemy or amenable to his tribunals for offenses committed by them. They were answerable only to their own government, and only by its laws as enforced by its armies could they be punished."

§ 713. Powers of the Commander-in-Chief of the Army and Navy.

The constitutional commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the service of the United States, is the President.[17] Through, or under, his orders, therefore, all military operations in times of peace, as well as of war, are conducted. He has within his control the disposition of troops, the direction of vessels of war and the planning and execution of campaigns. With Congress, however, lies the authority to lay down the rules governing the organization and maintenance of the military forces, the determination of their number, the fixing of the manner in which they shall be armed and equipped, the establishment of forts, hospitals, arsenals, etc., and, of course, the voting of appropriations for all military purposes.[18]

[17] Art. II, Sec. II, Cl. 1.

[18] The distinction of congressional from presidential powers in military matters is drawn by the Supreme Court in *Ex parte* Milligan, 4 Wall. 2; 18 L. ed. 281, in the following words:

"Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.

The power to make the necessary laws is in Congress, the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authority essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the Presi-

With respect to many matters of detail Congress has delegated to the President and to his executive subordinates the establishment of administrative orders for the government of the land and naval forces which it might constitutionally itself provide, but which in fact it is either impossible or unwise for it to attempt to do. All orders of the President, or of the Secretary of War issued under his authority whether given by virtue of his constitutional office as commander-in-chief or of his statutory powers have the full force of law.[19] But in all cases these orders must, if issued by virtue of authority congressionally given, pursue the terms of the granting statute; and if issued by virtue of his constitutional authority, be in accordance with the generally accepted principles of international law and custom. Where this is not done, they will not justify the acts of subordinates acting under them.[20]

§ 714. Declaration of War.

To Congress is expressly granted by the Constitution the power to declare war. By war is meant an armed conflict of a public nature, the parties to which are recognized as belligerents and entitled to all the rights and subject to all the obligations which international law recognizes and imposes.

But war may come into existence as a fact without a formal declaration, and in the Prize Cases[21] the Supreme Court has held that this existence of war as a fact may be recognized by the President, in advance of Congressional declaration, and that he may thereupon take action, as, for example, the establishment of

dent. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of officials, either soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature."

[19] United States v. Freeman, 3 How. 556; 11 L. ed. 724; Smith v. Whitney, 116 U. S. 167; 6 Sup. Ct. Rep. 570; 29 L. ed. 601.

[20] Little v. Barreme, 2 Cr. 170; 2 L. ed. 243.

[21] 2 Black, 635; 17 L. ed. 459.

a blockade, which in time of peace he would not be constitutionally empowered to institute.

After defining war in a public sense and asserting that a civil strife may become a public war by reason of numbers, powers and organization of the persons who originate and carry it on, the court say: "Whether the President, in fulfilling his duties as commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions, as will compel him to accord to them the character of belligerents, is a question to be decided by him, and the court must be governed by the decisions and acts of the political department of the government to which this power was entrusted. He must determine what degree of force the crisis demands. The proclamation of blockade is, itself, official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case." [22]

The first establishment of the blockade by the President was on April 19, 1861. July 13 of the same year Congress by act formally declared war to exist, and by retroaction validated the acts of the President prior to that date.

In the case of The Protector[23] the court held that the war had begun at the times of the President's two proclamations of blockade, April 19 and 27, 1861, but that it had closed at different dates in the different States. Thus in some of the States it was declared not to have ended until August 20, 1866, or about a year after active military operations had come to an end. The court in The Proctor case said: "The question in the present case is, when did the rebellion begin and end? In other words, what space of time must be considered as excepted from the operation of the Statute of Limitations by the war of rebellion?

"Acts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts

[22] In a dissenting opinion Justice Nelson, while granting that a civil strife might become a public war, with the parties thereto belligerents, declared that this change of status could not be brought about save by the formal action of Congress, the body which by the Constitution is authorized to declare war.

[23] 12 Wall. 700; 20 L. ed. 463.

become immediately the enemies of each other — all intercourse, commercial or otherwise, between them unlawful — all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemy's property, the drawing of bills of exchange or purchase on the enemies' country, the remission of bills or money to it are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved and, in fine, interdiction of trade and intercourse, direct or indirect, is absolute and complete by the mere force and effect of war itself. All the property of the people of the two countries on land or sea are subject to capture and confiscation by the adverse party as enemies' property, with certain qualifications as it respects property on land (Brown v. United States, 8 Cr. 110; 3 L. ed. 504). All treaties between the belligerent parties are annulled. The ports of the respective countries may be blockaded, and letters of marque and reprisal granted as rights of war, and the law of prizes as defined by the law of nations comes into full and complete operation, resulting from maritime captures, *jure belli.* War also effects a change in the mutual relations of all States or countries, not directly, as in the case of belligerents, but immediately and indirectly, though they have no part in the contest but remain neutral. This great and pervading change in the existing condition of a country, and in the relations of all her citizens or subjects, external and internal, from a state of peace, is the immediate effect and result of a state of war; and hence the same code which has annexed to the existence of a war all these disturbing consequences has declared that the right of making war belongs exclusively to the supreme or sovereign power of the State. This power in all civilized nations is regulated by the fundamental laws or municipal constitution of the country. By our Constitution, the power is lodged in Congress."

That no war can exist between the United States and a foreign State, except by the declaration of Congress there has never been any doubt. This declaration may, however, be, as in the case of the Mexican War, that a state of war exists, or one declaring that

war shall be begun. The terms of such a declaration fix the exact date of the beginning of the war so far as concerns matters of municipal law, and is binding on the courts of the State issuing it. From the viewpoint, however, of other nations, such a declaration is not conclusive, the beginning of the war being one of fact to be interpreted in the light of the general principles of international law.[24]

§ 715. The Prosecution of War.

The constitutional power given to the United States to declare and wage war, whether foreign or civil, carries with it the authority to use all means calculated to weaken the enemy and to bring the struggle to a successful conclusion. When dealing with the enemy all acts that are calculated to advance this end are legal. Indeed, the President in the exercise simply of his authority as commander-in-chief of the army and navy, may, unless prohibited by congressional statute, commit or authorize acts not warranted by commonly received principles of international law; and Congress may by law authorize measures which the courts must recognize as valid even though they provide penalties not supported by the general usage of nations in the conduct of war. Thus during the Civil War in certain cases the provision by congressional statute for the confiscation of certain enemy property or land was enforced, though such confiscation was not in accordance with the general usage of foreign States.

Even in dealing with its own loyal subjects, the power to wage war enables the government to override in many particulars private rights which in time of peace are inviolable.[25]

The power to wage war carries with it the authority not only to bring it to a full conclusion, but, after the cessation of active military operations, to take measures to provide against its renewal. As the court says in Stewart v. Kahn:[26] "The measures to be taken in carrying on war and to suppress insurrection, are

[24] Upon this point see the very thoughtful paper of T. S. Woolsey entitled "The Beginnings of War," published in Vol. I, p. 54, of the *Proceedings of the American Political Science Association.*

[25] For the limitations upon the war powers in this respect, see *post.*

[26] 11 Wall. 493; 20 L. ed. 176.

not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution. In the latter case the power is not limited to victories in the field and to the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

§ 716. The Organization and Disciplining of the Militia.

As has been seen, the "organizing, arming and disciplining of the militia," and the prescribing of the discipline for training them is expressly placed within the control of Congress. The actual training, however, of the militia, according to the discipline thus to be supplied by Congress, is kept within the hands of the state authorities. And, furthermore, to them is given in general the appointment of militia officers, and the entire government of the militia forces except when they have been called into the service of the General Government.

The present federal law passed under the constitutional authority for "organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States" is that of May 27, 1908, amending the act of January 21, 1903. This law provides:

"That the militia shall consist of every able-bodied male citizen [with certain exceptions later enumerated] of the respective States and Territories and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age, and shall be divided into two classes:— the Organized Militia, to be known as the National Guard of the State, Territory or District of Columbia, or by such other designations as may be given them by the laws of the respective States or Territories, and the remainder to be known as the Reserve Militia."[27] Section 4 of the act provides: "That whenever the

[27] A proviso makes the act applicable only to the militia organized as a land force.

United States is invaded, or in danger of invasion from any foreign nation, or of rebellion against the authority of the government of the United States, or the President is unable, with the regular forces at his command, to execute the laws of the Union, it shall be lawful for the President to call forth such number of the militia of the States or of the Territories or of the District of Columbia as he may deem necessary to repel such invasion, suppress such rebellion, or to enable him to execute such laws, and to issue his orders for that purpose, through the governor of the respective State or Territory, or through the commanding general of the militia of the District of Columbia, from which State, Territory or District such troops may be called, to such officers of the militia as he may think proper."

The act further provides that the militia when called into the federal service shall serve during the term of their enlistment, that the "organized militia" shall be called out by the President in advance of any volunteer force which it may be determined to raise, and that these troops may be employed "either within or without the territory of the United States." Punishment for refusal or neglect to obey a call is provided, and in general, provision made that the organization, armament and discipline governing the militia shall be the same as that prescribed for the regular volunteer forces of the United States.

The Secretary of War is directed to issue to the organized militia the necessary standard service arms and accoutrements. Instruction of the organized militia, practice marches and encampments, etc., are also provided for.

§ 717. The Militia as an Arm of the Federal Government.

The Constitution enumerates three purposes for aid in the effectuation of which the United States militia forces may be mandatorily called upon by the General Government. These are (1) to execute the laws of the Union, (2) to suppress insurrections, (3) to repel invasions.

The suppression of insurrections has been held to include the

waging of civil war for the putting down of rebellion,[28] and the repelling of invasions to include the providing against an attempted or threatened invasion.[29] The President may, when calling upon the militia, apply to the governors of the States to give the necessary orders, or may issue his orders directly to the commanding officers of the militia.[30] When called into the federal service, the militia comes under the same complete federal control as the regular national forces, and of course subject to the rules and articles of war.[31]

In Martin v. Mott[32] the doctrine was declared, which has not since been questioned, that the President is the sole and exclusive judge as to whether an exigency has arisen calling for a use of the militia by the federal authorities.

§ 718. The Use of the Militia and Federal Troops to Suppress Domestic Disorder.

From the foregoing it is seen that in all cases in which the integrity or existence of the National Government is attacked or threatened, or a resistance offered to the execution of its laws too great to be overcome by the ordinary agencies of government, the aid of the federal troops or of the organized militia of the States may be at once called upon. In cases, however, of domestic violence within a State, directed against its laws and government, the federal arm may extend help only when called upon by the state authorities.

In 1894 at the time of the great railroad strike of that year, the employment in Illinois of federal troops, there having been no request for their use by the authorities of that State, gave rise to a vehement protest on the part of the governor of the State. It would appear, however, that the action of the federal authorities in that instance was fully justified, the federal troops

[28] Texas v. White, 7 Wall. 700; 19 L. ed. 227; Tyler v. Defrees, 11 Wall. 331; 20 L. ed. 161.

[29] Martin v. Mott, 12 Wheat. 19; 6 L. ed. 537.

[30] Houston v. Moore, 5 Wh. 1; 5 L. ed. 19.

[31] Houston v. Moore, 5 Wh. 1; 5 L. ed. 19.

[32] 12 Wh. 19; 6 L. ed. 537.

being employed avowedly and in fact "to prevent obstruction to the federal postal service, to aid the federal courts in the exercise of their jurisdiction, and to enforce the law of July 2, 1890, forbidding conspiracies against interstate commerce."[23]

In *Re Debs*,[24] decided in 1895, the Supreme Court upheld the action of the federal authorities in 1894, in the course of the opinion saying:

"The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the Nation to compel obedience to its laws."

The court also goes on to assert that "the right to use force does not exclude the right of appeal to the courts for a judicial

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[23] 26 Stat. at L. 109, § 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

§ 4. "The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several District Attorneys of the United States under direction of the Attorney-General to institute proceedings in equity to prevent or restrain such violations."

To the protest which Governor Altgeld of Illinois issued, President Cleveland replied:

"Federal troops were sent to Chicago in strict accordance with the Constitution and laws of the United States, upon the demand of the Post-Office Department that obstruction of the mails should be removed, and upon the representations of the judicial officers of the United States that process of the Federal Courts could not be executed through the ordinary means, and upon abundant proof that conspiracies existed against commerce between the States.

"To meet these conditions, which are clearly within the province of Federal authority, the presence of Federal troops in the city of Chicago was deemed not only proper but necessary, and there has been no intention of thereby interfering with the plain duty of the local authorities to preserve the peace of the city."

[24] 158 U. S. 564; 15 Sup. Ct. Rep. 900; 39 L. ed. 1092.

determination and for the exercise of all their powers of prevention." [35]

§ 719. Military Government.

In a previous chapter the special administrative law governing persons in the military service of the United States has been considered. We have now to speak of the law regulating the conduct of the national armed forces in the possession and government of particular territories.

As will later appear, military government may constitutionally exist either in time of peace or of war, and over domestic as well as foreign territory.

§ 720. Military Government of Foreign Territory.

Military government of foreign territory by the armed forces of the United States may exist either as the result of hostile occupation in time of war, or by friendly international agreement, in time of peace. An instance of this last was the military occupation and administration of Cuba by the United States. The constitutional authority for thus employing our troops in foreign territory was derived not from the war powers of the President acting as commander-in-chief of the army and navy, for there was no existing war, but from the general powers of the United States as a sovereign State in all that relates to international relations.[36]

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[35] In this Chicago Railway Strike episode, as Professor Fairlie remarks in his *National Administration*, p. 38, the only novel feature was the use of the army for the enforcement of the comparatively recent statute prohibiting conspiracies against interstate commerce, and in the broader interpretation given to what constitutes an obstruction of the postal service. Before this when strikers had cut out passenger and baggage cars from a train leaving the mail cars undisturbed, it had been held that the mails were not interfered with. But in this case it was held that such an act did amount to an obstruction of the postal service.

For a detailed history of the instances in which federal aid has been extended in quelling domestic disturbances, see Senate Document No. 209, 57th Congress, 2d Session.

[36] See *ante*, § 36.

The law of military occupation of foreign territory is that established by general international law. According to this, the power of the military commander is constitutionally supreme. For no act that he or his subordinates may commit can he or they be held civilly liable in the civil courts of the United States or of the State whose territory is occupied. The only limits to the military authority are those which international law and usage, upon the ground of humanity and justice, impose, and breaches of these are cognizable only in the military courts. As was said in New Orleans v. Steamship Co.[37] and repeated in Dooley v. United States:[38] "The conquering power has the right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. These principles have the sanction of all publicists, who have considered the subject."

"Martial law in a hostile country consists in the suspension by the occupying military authority of the criminal and civil law, and of the domestic administration and government in the occupied place or country, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, so far as military necessity requires this suspension, substitution or dictation." [39]

"The commander of the forces may proclaim that the administration of all civil and penal law shall continue wholly or in part.

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[37] 20 Wall. 387; 22 L. ed. 354.

[38] 182 U. S. 222; 21 Sup. Ct. Rep. 762; 45 L. ed. 1074.

[39] Lieber's *Instructions for the Government of Armies of the United States in the Field.*

as in times of peace, unless otherwise ordered by the military authority." [40]

During military occupation of foreign territory, though there is no obligation either by constitutional or international law, to establish courts or to permit the continued operation of local courts for the trial of ordinary civil and criminal cases according to local law, there is nothing to prevent this being done, and in fact, in modern times this is usually done. Indeed, the principle is now well established that, until expressly declared otherwise, local private law and the tribunals for its administration, continue in operation. But in all such cases the courts, whether established or allowed to continue, exist essentially as military courts, and the law which they enforce has validity only by military order and permission. For the first effect of military occupation is to sever, for the time being, all the former political relations of the inhabitants of the territory, and to destroy the *de jure* character of the former organs of government.

§ 721. Military Government of Hostile Domestic Territory.

In practically all respects the laws governing the military occupation of hostile foreign territory apply to the military occupation of hostile domestic territory in time of a civil war which has assumed a public character.

In the case of New Orleans v. Steamship Co.,[41] from which quotation has already been made, the court said: "Although the city of New Orleans was conquered and taken possession of in a civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the National Government in the Confederate States, that government had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war." [42]

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[40] *Instructions, etc.*

[41] 20 Wall. 387; 22 L. ed. 354.

[42] Citing the Prize Cases, 2 Black, 635; 17 L. ed. 459; Mrs. Alexander's Cotton, 2 Wall. 404; 17 L. ed. 915; and Mauran v. Insurance Co., 6 Wall. 1; 18 L. ed. 836.

erent power, they were constitutional, not only with reference to the hostile, but to the friendly inhabitants of the hostile territory, as well as to those persons who, though not inhabitants of the hostile territory, should in any way aid or abet the insurrection.

The right of confiscation and other belligerent rights thus exercisable by the military authorities within the United States during civil war must, in every case, be authorized by some competent officer or tribunal acting under the sanction of an act of Congress. That is to say, the individual soldier or officer is not allowed individually, and without obtaining the decree of a competent military or other tribunal, to seize private property as a prize of war. This principle was discussed in the early case of Brown v. United States.[46] As was said in that case, "War gives the right to confiscate, but does not itself confiscate the property of the enemy." For this an act of Congress is necessary. "When war breaks out, the question what shall be done with enemy property in our country is a question rather of policy than of law. The rule which we apply to the property of our enemy will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary."

§ 722. Military Government of Domestic Territory in Times of Peace.

Military governments established on foreign territory in time of war do not necessarily come to an end with the declaration of peace and the annexation of the occupied territory to the United States; and the same is true after the conclusion of peace of military governments established in insurrectionary domestic territory. But these governments, though military in character, rest upon a different basis, and have somewhat different powers from those maintained during war.

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[46] 8 Cr. 110; 3 L. ed. 504.

Military governments in time of peace, whether in territories newly annexed to the United States, or in districts lately in rebellion, no longer derive their authority from the President as commander-in-chief of the army and navy, but exist by the tacit or express command of Congress. Until Congress acts, the President may maintain military governments by virtue of the fact that he is the chief executive of the nation, and sworn to "take care that the laws be faithfully executed." Such governments as he may establish or continue in existence after the conclusion of war in annexed territory are, however, subject to the will of Congress either to change or abolish.

Illustrative of this principle were the military governments set up in the Southern States during and after the conclusion of the Civil War. While that war was in progress there was no question as to the power of the Executive to set up military governments in districts occupied by the federal troops. With the conclusion of that war, however, Congress at once asserted its exclusive right to determine the manner in which the States lately in secession should be ruled until their civil status should be fully restored.

The right of Congress to maintain military governments in States of the Union after the restoration of peace was partly on the ground of military necessity — that, though war had ceased, the results for which it had been waged were not yet fully secured — and partly on the ground that it lay with Congress to guarantee to the States loyal governments republican in form, and that to obtain these it was necessary for a time to furnish protection to the loyal portions of their populations.

The status of these military and "reconstruction" governments was exhaustively considered in the great case of Texas v. White,[47] decided in 1869.

After referring to the various steps taken to put down the rebellion and establish civil rule in Texas, the court said:

"The power exercised by the President was supposed doubtless

[47] 7 Wall. 700; 19 L. ed. 227.

to be derived from his constitutional functions as commander-in-chief; and, so long as the war continued, it cannot be denied that he might institute temporary governments in insurgent districts, occupied by the national forces, or take measures, in any State, for the restoration of state governments faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws. But the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress. Under the fourth article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guaranteed to each State a republican form of government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not. This is the language of the late Chief Justice speaking for this court in a case from Rhode Island (Luther v. Borden, 7 How. 1; 12 L. ed. 581) arising from the organization of opposing governments in that State. And we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a State deprived of all rightful government by revolutionary violence, though necessarily limited to cases where the rightful government is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the State."

That, until Congress acts, the military governments established by the President under his war powers may continue in existence after the conclusion of peace in territories belonging to the United States, has been several times declared by the Supreme Court.

Thus, with reference to the continuance of the military government established in California after its annexation to the United States, the court, in Cross v. Harrison, declared:

"It was the government when the Territory was ceded as a conquest, and it did not cease as a matter of course or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from

the inaction of both is that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the Government." [48]

The principle thus laid down in Cross v. Harrison was followed by the court in the Insular Cases with reference to the continuance of the military governments in Porto Rico and the Philippines, after their annexation by the United States.[49]

Though military in form the governments established or maintained by the President in time of peace in territories subject to the sovereignty of the United States may not be granted as complete a governing authority as that which they possess in time of war. The authority which may constitutionally be given to or exercised by them is determined by the purposes for which they exist. In time of war they have full power, legislative, executive, and judicial, to do anything the laws of war, as determined by international usage, permit to be done, that will strengthen themselves or weaken the enemy. War having ended, however, and the territory become domestic, the powers of the military com-

[48] Upon this point see Magoon, *Reports on the Law of Civil Government in Territory Subject to Military Occupation*, p. 17, and authorities there cited.

[49] In Santiago v. Nogueras (214 U. S. 260; 29 Sup. Ct. Rep. 608; 53 L. ed. 989) the court say: "By the ratifications of the treaty of peace, Porto Rico ceased to be subject to the Crown of Spain, and became subject to the legislative power of Congress. But the civil government of the United States cannot extend immediately and of its own force over conquered and ceded territory. Theoretically, Congress might prepare and enact a scheme of civil government to take effect immediately upon the cession, but, practically, there always have been delays and always will be. Time is required for a study of the situation, and for the maturing and enacting of an adequate scheme of civil government. In the meantime, pending the action of Congress, there is no civil power under our system of government, not even that of the President as civil executive, which can take the place of the government which has ceased to exist by the cession. Is it possible that, under such circumstances, there must be an interregnum? We think clearly not. The authority to govern such ceded territory is found in the laws applicable to conquest and cession. That authority is the military power, under the control of the President as Commander-in-Chief."

For a further discussion of this subject see Chapter XXVII.

mander become simply administrative in character, and his acts, so far as the necessities of the case permit, are limited by the general and constitutional laws of the country under whose authority he acts. He, in fact, no longer enjoys authority by virtue of belligerent right, but as an agent of the sovereign of the country for the establishment and maintenance of civil rights therein. As Magoon expresses it, he ceases to occupy the place of the suspended or expelled sovereignty, and becomes an instrument of the new sovereignty. He becomes the representative of sovereignty, instead of a substitute.[50]

The powers of the military government in time of peace in domestic territory being those simply of a local administrative agent of the United States, are subject to two general limitations. First, being of an administrative character, they do not include general legislative power, that is, the authority to establish laws of more than strictly local effects; and, second, such powers as are possessed, are subject to privileges and immunities created and guaranteed by the Constitution. How far these constitutional privileges apply to governments, whether military or civil, established in territories belonging to, but not "incorporated" into the United States, has been considered in an earlier chapter. In all other domestic territory, whether in a Territory or in a State lately in rebellion, these constitutional limitations apply, and the agents have, therefore, and can be endowed by Congress and the executive only with such powers as may be exercised at any time and in any place under the doctrines of "martial" as distinguished from "military law."[51] In short, their extent is measured by the necessity for their exercise.

Acting upon this principle, the Supreme Court in Raymond v. Thomas[52] held void an act of a reconstruction military commander in South Carolina, by which he attempted to annul the decree of a court of that State. In its opinion the court said: "It was an

[50] *Reports on the Law of Civil Government in Territory Subject to Military Occupation*, p. 20.

[51] See the next chapter.

[52] 91 U. S. 712; 23 L. ed. 434.

arbitrary stretch of authority needful to no good end that can be imagined. Whether Congress could have conferred the power to do such an act is a question we are not called upon to consider. It is an unbending rule of law, that the exercise of military power where the rights of the citizens are concerned, shall never be pushed beyond what the exigency requires." [53]

With reference to the absence of general legislative power, after war is terminated, the court in Dooley v. United States[54] held that though, prior to the treaty of peace, the military commander might, as a belligerent right, levy customs duties on goods coming into Porto Rico from the United States, after that date he no longer had the authority.[55]

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[53] Citing Mitchell v. Harmony, 13 How. 115; 14 L. ed. 75.

[54] 182 U. S. 222; 21 Sup. Ct. Rep. 762; 45 L. ed. 1074.

[55] In its opinion the court said:

"In their legal aspect, the duties exacted in this case were of three classes: (1) The duties prescribed by General Miles under order of July 26, 1898, which merely extended the existing regulations; (2) the tariffs of August 19, 1898, and February 1, 1899, prescribed by the President as Commander in Chief, which continued in effect until April 11, 1899, the date of the ratification of the treaty and the cession of the island to the United States; (3) from the ratification of the treaty to May 1, 1900, when the Foraker act took effect.

"There can be no doubt with respect to the first two of these classes, namely, the exaction of duties under the war power, prior to the ratification of the treaty of peace. . . .

"Different considerations apply with respect to duties levied after the ratification of the treaty and the cession of the island to the United States. Porto Rico then ceased to be a foreign country, and, as we have just held in De Lima v. Bidwell, the right of the collector of New York to exact duties upon imports from that island ceased with the exchange of ratifications. We have no doubt, however, that, from the necessities of the case, the right to administer the government of Porto Rico continued in the military commander after the ratification of the treaty and until further action by Congress. Cross v. Harrison, 16 How. 164; 14 L. ed. 889. At the same time, while the right to administer the government continued, the conclusion of the treaty of peace and the cession of the island to the United States were not without their significance. By that act, Porto Rico ceased to be a foreign country, and the right to collect duties upon importations from New York to Porto Rico also ceased. The spirit as well as the letter of the tariff laws admits of duties being levied by a military commander only upon importations from foreign countries; and, while his power is necessarily despotic, this must be understood rather in an administrative than in a

legislative sense. While in legislating for a conquered country he may disregard the laws of that country, he is not wholly above the laws of his own. For instance it is clear that, while a military commander during the Civil War was in occupation of a southern port he could impose duties upon merchandise arriving from abroad, it would hardly be contended that he could also impose duties upon merchandise arriving from ports of his own country. His power to administer would be absolute, but his power to legislate would not be without certain restrictions,— in other words, they would not extend beyond the necessities of the case. Thus, in the case of The Admittance (Jecker v. Montgomery, 13 How. 498; 14 L. ed. 240) it was held that neither the President nor the military commander could establish a court of prize competent to take jurisdiction of a case of capture, whose judgments would be conclusive in other admiralty courts. It was said that the courts established in Mexico during the war 'were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property, while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize,' although Congress, in the exercise of its general authority in relation to the national courts, would have power to validate their action. The Grapeshot, 9 Wall. 129; 19 L. ed. 651; *sub nom.* The Grapeshot v. Wallerstein.

"So, too, in Mitchell v. Harmony, 13 How. 115; 14 L. ed. 75, it was held that, where the plaintiff entered Mexico during the war with that country, under a permission of the commander to trade with the enemy and under the sanction of the executive power of the United States, his property was not liable to seizure by law for such trading and that the officer directing the seizure was liable to an action for the value of the property taken. To the same effect is Mostyn v. Fabrigas, 1 Cowp. 180."

CHAPTER LXII.

MARTIAL LAW.

§ 723. Martial Law Defined.

In the most comprehensive sense of the term, Martial Law includes all law that has reference to, or is administered by, the military forces of the State. Thus it includes (1) Military Law Proper, that is, the body of administrative laws created by Congress for the government of the army and navy as an organized force; (2) the principles governing the conduct of military forces in time of war, and in the government of occupied territory; and, (3) Martial Law *in sensu strictiore,* or that law which has application when the military arm does not supersede civil authority but is called upon to aid it in the execution of its civil functions. This last form of Martial Law is to be sharply distinguished from those forms of Military Law which have been considered in the preceding chapters.[1]

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[1] "There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within the States or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of States maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under the military law, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander, under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated martial law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities whose ordinary law no longer adequately secures public safety and private rights." *Ex parte* Milligan, 4 Wall. 2; 18 L. ed. 281.

It may be observed that down to the time of 1689, and indeed nearly a century later by Blackstone, when Martial Law is spoken of, reference is had to the first two of the above described forms of military jurisdiction.

§ 724. Martial Law a Form of the Police Power.

That which brings martial law closely into relation with military law is the fact that it is administered by the armed forces of the State, and that it partakes, in a measure at least, of its absolute character. That is to say, under its control, certain of the guarantees to the individual against personal injury on the part of those in authority, furnished by the civil law, are in abeyance. But in all other respects, as we shall see, martial law belongs in the field of civil rather than that of the military law. Indeed, martial law is essentially but a branch of the police law of the State, and its exercise is governed by the same principles as those which control the exercise of the so-called Police Powers of the State.

The great fundamental principle of American jurisprudence may be said to be the sanctity of the personal and property rights of the individual. To secure these our written constitutions have been adopted. The obverse of this principle is that nowhere in our governments has there been vested absolute power, that is, authority the limits and definition of which the person expressing it himself fixes, and for the improper exercise of which, or for an *ultra vires* act, he may not be held civilly and criminally responsible. As the Supreme Court in United States v. Lee,[2] speaking through Justice Miller, declared:

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man, who by accepting office, participates in its functions, is only the more strongly bound to submit to the supremacy, and to observe the liabilities which it imposes upon the exercise of the authority which it gives."

Not only is this the general principle of our system of law and government, applicable to the military as well as to the civil arms of the State, but our Constitutions, state and federal, specify

[2] 106 U. S. 196; 1 Sup. Ct. Rep. 240; 27 L. ed. 171.

In a general, and yet essentially correct sense, all of the legal control exercised by a State over persons and property, whatever form it may take, is an exercise of the State's Police Power. In American constitutional law, however, characterized as it is by the existence of written constitutional limitations upon the legal powers of governmental organs, whether legislative, executive, or judicial, the phrase Police Power is ordinarily limited in its application to the general power which the State, in cases of need, may employ without reference to the ordinary private rights of person and property of the individual.

§ 725. Police Power Defined.

One of the classic definitions of the Police Power is that of Chief Justice Shaw, given in his opinion in Commonwealth v. Alger.[4] He says: "We think it is a settled principle, growing out of the nature of well-ordered civil society, that every owner of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the general enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth is . . . held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain,— the right of a government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor.[5] The power we allude to is

[4] 7 Cush. 53.

[5] This requirement of compensation in the case of the appropriation of private property under the right of eminent domain, is created in this country

rather the police power; the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and the sources of this power than to mark its boundaries, and prescribe the limits to its exercise."

Hare, in his *American Constitutional Law*,[6] says:

"The police power may be justly said to be more general and pervading than any other. It embraces all the operations of society and government; all the constitutional provisions presuppose its existence, and none of them preclude its legitimate exercise. It is impliedly reserved in every public grant. Chartered rights and privileges are therefore like other property, held in subordination to the authority of the government, which may be so exercised as to preclude the use or doing of the very thing which the company was constituted or authorized to manufacture or perform. The legislature cannot be presumed to have intended to tie its hands in this regard in the absence of express words; but if such a purpose were declared, it would fail, as an attempt to part with an attribute of sovereignty which is essential to the welfare of the community."

§ 726. Police Power Limited.

Though, as we have seen, there are necessarily many circumstances under which the political power, in behalf of public interests, may interfere with the freedom of action of the individual and the use by him of his own property, in no one of these cases

by express constitutional provisions. In the absence of such constitutional provisions, express and implied, the individual thus deprived of property would have no legal claim for damages. To the author it appears proper to group the power of eminent domain under the general police powers of the State.

[6] Vol. II, 766.

may this interference be an arbitrary one. That is to say, in each case, the propriety of the interference may be questioned by the individual, and, when so questioned, the official whose act constitutes the interference must be able to justify his act by referring to a valid law and to some consideration of public necessity or convenience. If a person is drafted into military service, there must have been enacted a valid drafting law, including within its application the class of persons to which the individual drafted belongs. If a contract formally valid is refused enforcement, it must be shown to be opposed to public policy. If property is taken under eminent domain, it must be for a public use, and compensation must be given. If the rates charged by public service corporations are regulated by law, the regulation must be a reasonable one and not one, in its effect, confiscatory of private property. Finally, to constitute a valid exercise of the so-called police power of the State, there must be shown some public advantage to be gained by thus interfering with the personal liberty and property rights of the individual.

Now, in exactly the same way in which the civil authorities may by law or through executive action control the activities of the individual and the use of his property in the interest of the public good, the military arm of a government may be employed to preserve the public peace and to secure the execution of the laws.

In European countries, living under written constitutions, provision is quite generally made for the declaration in times of danger of what is called a "state of siege," the effect of which is immediately to suspend the operation of all the ordinary constitutional limitations upon executive power. No similar status is known to American law. The use of the military arm of our States or of the Federal Government in time of peace and upon domestic soil to maintain order and secure the execution of law in no wise operates to suspend civil law or to negate individual rights of liberty and property, any more than the exercise of the ordinary police powers by the State has this effect. The use of

the military forces of a state for the maintenance of order and are, indeed, not dissimilar in purpose and character to the employment by a sheriff of a posse comitatus to assist him in making an arrest, preventing an escape, or serving a writ. In such cases those who exercise authority are obliged to justify whatever acts they may have committed by showing their necessity, or, at least, producing evidence to show that they had reasonable grounds for believing them to be necessary.

§ 727. Martial Law Does not Abrogate Civil Law and Civil Guarantees.

There is, then, strictly speaking, no such thing in American law as a declaration of martial law whereby military is substituted for civil law. So-called declarations of martial law are, indeed, often made, but the legal effect of these goes no further than to warn citizens that the military powers have been called upon by the executive to assist him in the maintenance of law and order, and that, while the emergency lasts, they must, upon pain of arrest and punishment, not commit any acts which will in any way render more difficult the restoration of order and the enforcement of law. Some of the authorities stating substantially this doctrine are quoted in the footnote below.[7]

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[7] "The term martial law refers to the exceptional measures adopted whether by the military or the civil authorities, in times of war or of domestic disturbance, for the preservation of order and the maintenance of the public authority. To the operation of martial law all the inhabitants of the country or of the disturbed district, aliens as well as citizens, are subject." *Moore, Int. Law Digest*, II, 186. As to the subjection of aliens to Martial Law, see Moore, II, 196.

In the cases of the Bristol Riots in 1831–1832 (S. T. U. S. III, 2–56), the opinion reads: "A soldier for the purpose of establishing civil order is only a citizen armed in a particular manner. He cannot because he is a soldier excuse himself if without necessity he takes human life. The duty of magistrates and peace officers to summon or to abstain from summoning the assistance of the military depends in like manner on the necessities of the case. . . . The whole action of the military when called in ought, from first to last, to be based on the principle of doing, and doing without fear, that which is absolutely necessary to prevent serious crime, and of exercising all care and skill with regard to what is done. No set of rules exists which

During the time that the military forces are employed for the enforcement of law, that is to say, when so-called martial law is in force, no new powers are given to the executive, no extension of arbitrary authority is recognized, no civil rights of the individual are suspended.[8] The relations of the citizen to his State are unchanged. Whatever interference there may be with his personal freedom or property rights must be justified, as in

governs every instance or defines beforehand every contingency which may arise. . . . The question whether, on any occasion, the moment has come for firing upon a mob of rioters, depends, as we have said, on the necessities of the case. . . . An order from the magistrate who is present is required by military regulations, and wisdom and discretion are entirely in favor of the observance of such a practice. But the order of the magistrate has at law no legal effect. Its presence does not justify the firing if the magistrate is wrong. Its absence does not excuse the officer from declining to fire when the necessity exists. With the above doctrines of English law the Riot Act does not interfere. Its effect is only to make the failure of a crowd to disperse for a whole hour after the proclamation has been read a felony; and on this ground to afford statutory justification for dispersing a felonious assemblage, even at the risk of taking life."

In Ela v. Smith (5 Gray [Mass.], 121) the court say: "While thus recognizing the authority of the civil officers to call out and use an armed force to aid in suppressing a riot or tumult actually existing, or preventing one which is threatened, it must be borne in mind that no power is conferred on the troops, when so assembled, to act independently of the civil authority. . . . They are to act as an armed police only, subject to the absolute and exclusive control and direction of the magistrates and other civil officers designated in the statute, as to the specific duty or service which they are to perform. Nor can the magistrate delegate his authority to the military force which he summons to his aid; or vest in the military authorities any discretionary power to take any steps or do any act to prevent or suppress a mob or riot. They must perform only such service, and render such aid, as is required by the civil officers. . . . It does not follow from this, however, that the military force is to be taken wholly out of the control of the proper officers. They are to direct its movements in the execution of the orders given by the civil officers, and to manage the details in which a specific service or duty is to be performed. But the service or duty must be first prescribed and designated by the civil authority."

[8] The writ of habeas corpus may have been suspended. Of this we shall speak presently. But this suspension does not give any additional arbitrary authority to either the civil or military authorities,— it does not operate to legalize any act of theirs that otherwise would have been illegal. The only effect of the suspension of the writ is to prevent, for the time being, a judicial examination of the legality of the detention of the individual.

the case of the police power, by necessity, actual or reasonably presumed. During times of disorder, such as lead to a call upon the military forces for assistance, necessity naturally demands the commission of acts which in more tranquil times are not demanded, and thus in fact, those in authority may control the individual and his property in ways which they could not legally do at other times, but the principle still holds good that necessity, and necessity alone, will justify an infringement upon private rights of person and property.

§ 728. Martial Law and Military Government Distinguished.

It is thus seen that martial rule, that is, the use of the military arm for the enforcement of civil law, is something quite different from the establishment of military government over territory conquered in public war. Mr. Magoon draws this distinction admirably in the following words: "A military government," he says, "takes the place of a suspended or destroyed *sovereignty*, while martial law, or, more properly, martial rule, takes the place of certain governmental agencies which for the time being are unable to cope with existing conditions in a locality which remains subject to the sovereignty. The occasion of military government is the expulsion of the sovereignty theretofore existing, which is usually accomplished by a successful military invasion. The occasion of martial rule is simply public exigency which may rise in time of war or peace. A military government since it takes the place of a deposed sovereignty, of necessity continues until a permanent sovereignty is again established in the territory. Martial rule ceases when the district is sufficiently tranquil to permit the ordinary agencies of government to cope with existing conditions." [9]

§ 729. Luther v. Borden.

At the time of Dorr's Rebellion the legislature of Rhode Island passed the following act: "Be it enacted . . . the State of

[9] *Reports on the Law of Civil Government in Territories Subject to Military Occupation*, p. 12.

Rhode Island and Providence Plantations is hereby placed under martial law, and the same is declared to be in full force, until otherwise ordered by the General Assembly, or suspended by proclamation of his Excellency the Governor of the State."

In the case of Luther v. Borden[10] an action of trespass *quare clausum fregit* was brought by the plaintiff against the defendant for breaking and entering the house of Luther. Border set up as defense that he was a member of the military called out in defense of the old government, that he acted under orders, and that those orders were justified by the exigencies of the time. The case having reached the Supreme Court, Taney, in his opinion, said:

"In relation to the act of the legislature declaring martial law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by the State. Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the state authorities. And, unquestionably, a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of the military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain

[10] 7 How. 1; 12 L. ed. 581.

itself and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest anyone, who, from the information before them they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, and any injury wilfully done to person or property, the party by whom, or by whose order, it is committed, would undoubtedly be answerable."

§ 730. Martial Rule and War Distinguished.

The correctness of the reasoning and of the conclusion of the Chief Justice in this case cannot be questioned except in one respect. Speaking of the condition of affairs existing at the time the alleged trespass was committed, Taney said: "It was a state of war and the established government resorted to the rights and usages of war to maintain itself and to overcome the unlawful opposition." It is not correct to say that war then existed in Rhode Island. War, in public law, has, as is well known, a definite meaning. It means a contest between public enemies termed belligerents, and to the status thus created, definite legal rights and responsibilities are attached by international and constitutional law. War is thus sharply distinguished from a mere insurrection or resistance to civil authority. Until the parties to such a contest are recognized as belligerents, that is, until the struggle has become a "war," the matter is wholly one of municipal law,— one lying wholly without the province of international law which defines and fixes the laws and usages of war. Thus Luther's act was undoubtedly justified, under the constitutional principles governing the rule of martial law, but it could have received no sanction from the laws of war which are applicable

only to a state of war. Indeed, it may be said that a State of the Union has not the constitutional power to create, by statute or otherwise, a state of war, or by legislative act or executive proclamation to suspend, even for the time being, all civil jurisdiction.

This point is emphasized by Justice Woodbury in his dissenting opinion. After showing that for many years no such an act would be tolerated in England, and pointing out the constitutional safeguards to personal liberty that have been specifically provided in American public law, the justice says: "It looks certainly like pretty bold doctrine in a constitutional government, that, even in time of legitimate war, the legislature can properly suspend or abolish all constitutional restrictions, as martial law does, and lay all the personal and political rights of the people at their feet." In fact, however, Woodbury continues, no war in a technical sense, that is, as distinguished from a domestic insurrection, existed or constitutionally could have existed in Rhode Island at the time. No State of the Union, he points out, has the authority to declare war, this power, by the federal Constitution, being vested in Congress,[11] or "to engage in war unless actually invaded, or in such imminent danger as will not admit of delay,"[12] this last qualification without doubt referring to danger from a foreign source or from Indians. The dissenting opinion continues: "Congress alone can declare war, and . . . all other other conditions of violence are regarded by the Constitution as but ordinary cases of private outrage to be punished by prosecutions in the courts, or as insurrections, rebellions or domestic violence, to be put down by the civil authorities, aided by the militia; or, when these prove incompetent, by the General Government when appealed to by the State for aid, and matters appear to the General Government to have reached the extreme stage, requiring more force to sustain the civil tribunals of a State, or requiring a declaration of war, and the exercise of all its extraordinary rights. Of these last, when applied to as here,

[11] Art. I, Sec. 8.
[12] Art. I, Sec. 10, Cl. 3.

and the danger has not been so imminent as to p
cation the General Government is responsible
quences."

§ 731. Powers of Military Commander in Cas Disorder.

It is to be observed before leaving this poin regards the acts that may be done by military a ities in effectuating their purposes, the necessity present, there is no difference between the com in a domestic insurrection and in a war. As the of Pennsylvania in a recent case[13] has said: " whatever powers may be needed for the accomp end, but his use of them is followed by different c war he is answerable only to his military superi done in domestic territory, even in the suppressi order, he is accountable, after the exigency has pa of the land, both by prosecution in the crimina civil action at the instance of the parties aggrie

A very recent case emphasizing the extent of th that may be exercised by the civil authorities of of emergency is that of Moyer v. Peabody.[14] He brought by the plaintiff in error against a form State, and other state officers for an imprisonmen their order at a time when considerable disor the country had been declared in a state of insu state troops had been called upon to assist the civ the maintenance of law and order. The Supre opinion affirming the order of the court below complaint affirm the right of the civil authorities not only for purposes of punishment but to prev of hostile acts, and say: "So long as such arre good faith and in the honest belief that they are to head the insurrection off, the governor is the

[13] Commonwealth of Pa. *ex rel.* Wadsworth v. Shortall,
[14] 212 U. S. 78; 29 Sup. Ct. Rep. 235; 53 L. ed. 410.

cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief. If we suppose a governor with a very long term of office, it may be that a case could be imagined in which the length of the imprisonment would raise a different question. But there is nothing in the duration of the plaintiff's detention or in the allegations of the complaint that would warrant submitting the judgment of the governor to revision by a jury. It is not alleged that his judgment was not honest, if that be material, or that the plaintiff was detained after fears of the insurrection were at an end."

This language is too broad. In all cases it should be required that reasonable ground should be shown for believing the infringement of personal and property rights was demanded. The court do, indeed, immediately add that "no doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding that he had sole command at the time and acted to the best of his knowledge. That is the position of the captain of a ship." But this, in turn, is followed by the statement that "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."

§ 732. Martial Law in Time of War.

Thus far the discussion has related to martial rule as exercisable in time of peace, that is, in times when, to be sure, civil disorder prevails, but when war — public war — does not exist. We have now to speak of martial rule when this latter condition is present.

It has already been learned that in war the enemy, be he a foreign one, or a rebel to whom the status of belligerent has been given, has no legal rights which those opposed to him must respect.[15]

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[15] He has of course those rights which international law recognizes, but these are not of a constitutional, or, strictly speaking, of a legal nature. The

When a civil contest becomes a public war, all persons living within limits declared to be hostile become *ipso facto* enemies, and subject to treatment as such. As the Supreme Court, in Ford v. Surget,[16] say with reference to the Civil War: "The district of country declared by the constituted authorities, during the late Civil War, to be in insurrection against the government of the United States, was enemy territory, and all the people residing within such district were, according to public law, and for all purposes connected with the prosecution of the war, liable to be treated by the United States, pending the war, and while they remained within the lines of insurrection, as enemies, without reference to their personal sentiments and dispositions."

Different conditions prevail, however, in loyal districts. In these the existence of war does not operate to destroy or suspend the civil rights of the inhabitants.

Upon the actual scene of war, there is no question but that, for the time being, the military authorities are supreme, and that these may do whatever may be necessary in order that the military operations which are being pursued may succeed. Here martial law becomes inextinguishable from military government. "When martial law is invoked in face of invasion or rebellion that rises to proportions of belligerency, it is war power pure and simple."[17] It is in this sense that Field defines martial law as "simply military authority exercised in accordance with the laws and usages of war," and the Supreme Court as "the law of necessity in the actual presence of war."[18]

The necessities being great and extraordinary, the executive and administrative, that is to say, the military, action that will be justified is correspondingly extensive. But, the populace being loyal, and the territory domestic, private rights of person and

rebel, though recognized as a belligerent, and, therefore, not entitled to claim from the government which he is resisting any of the rights created by its law, may, by that government, if it sees fit, be held responsible as a violator of its law. See Prize Cases, 2 Black, 635; 17 L. ed. 459.

[16] 97 U. S. 594; 24 L. ed. 1018.

[17] Berkheimer, *Military Law*, 2d ed., 399.

[18] United States v. Diekelman, 92 U. S. 520; 23 L. ed. 742.

property still persist, though subject, as in all other cases, to the exercise of the police powers of the State. Those who exercise these powers, though military in character, still remain liable for any abuse of their authority. The civil courts are not necessarily closed, nor are any of the private actions of individuals subject to restraint except in so far as the efficiency of public service may require.

Private property may be seized and appropriated to a public use without the consent of the owner, when the public necessity demands. This taking of private property is, however, the courts have declared, not an exercise of military power which gives to the owner no claim for compensation, but a taking for the public use which, under the provision of the Fifth Amendment, demands that compensation be made. The manner of taking may, however, be that of the police power, in that the urgency may not permit the ordinary proceedings for valuation and condemnation.[19]

In Mitchell v. Harmony[20] Chief Justice Taney has stated the general principle governing the authority and responsibility of military officers in the following words:

"There are," he says, "occasions where private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy, and also where a military officer charged with a particular duty may impress private property and take it for public use. Under these cir-

[19] "Private property, the Constitution provides, shall not be taken for public use without just compensation. . . . Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate or impending danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. . . . Exigencies of this kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown, the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner." United States v. Russell, 13 Wall. 623; 20 L. ed. 474.

[20] 13 Wall. 115; 14 L. ed. 75.

cumstances the government is bound to make full compensatic to the owner; but the officer is not a trespasser. But in ever such case the danger must be present or impending, and th necessity such as does not admit of delay or the intervention c the civil authority to provide the requisite means. It is in possible to define the particular circumstances in which the powe may be lawfully exercised. Every case must depend on its ow circumstances. It is the emergency that gives the right, and th emergency must be shown before the taking can be justified. I deciding upon this necessity, the state of facts as they appeare at the time will govern the decision, because the officer in con mand must act upon the information of others as well as his ow observation. And if, with such information as he can obtai there is reasonable ground for believing that the peril is imm diate or the necessity urgent, he may do what the occasion seem to require, and the discovery that he was mistaken will not mak him a wrongdoer. It is not enough to show that he exercised a honest judgment, and took the property to promote the publi service, he must also prove what the nature of the emergency wa or what he had reasonable grounds to believe it to be; and it wi then be for the court and jury to say whether it was so pressin as to justify an invasion of private right. Unless this is estal lished, the defense must fail because it is very clear that the la will not permit private property to be taken merely to insure th success of an enterprise against a public enemy." . . . "I can never be maintained that a military officer can justify hin self for doing an unlawful act, by producing the order of hi superior. The order may palliate, but it cannot justify."

§ 733. Exercise of Military Authority Outside the Immediat Theatre of War: Ex Parte Milligan.

Under the stress of military exigency, upon the actual theat of war such civil guarantees as the writ of habeas corpus, in munity from search and seizure, etc., may, of course, be su pended. As to this there is no question. There is, however, serious question whether, when war exists, these rights may, b

legislative act or executive proclamation, be suspended in regions more or less remote from active hostilities. This question was raised and carefully considered in the famous Milligan case[21] in which the Supreme Court was called upon to pass upon the authority of a military commission, during the Civil War, to try and sentence upon the charge of conspiracy against the United States government one Milligan, who was not a resident of one of the rebellious States, nor a prisoner of war, nor ever in the military or naval service of the United States, but was at the time of his arrest a citizen of the State of Indiana in which state no hostile military operations were then being conducted.

The military commission had been created pursuant to an act of Congress of March 3, 1863, authorizing the suspension of the writ of habeas corpus throughout the United States by the President, but providing that lists of persons, not prisoners of war, held under military authority should be furnished within a given time to the judges of the federal circuit and district courts, and that one so imprisoned whose name was not thus reported might appeal for release to the civil courts.

Five of the justices of the Supreme Court held that Congress was without the constitutional authority to suspend or authorize the suspension of the writ of habeas corpus, and provide military commissions in States outside the sphere of active military operations and with their civil courts open and ready for the transaction of judicial business. The remaining four justices held that Congress had not in fact made legislative provision for the military tribunal in question, but asserted that it possessed the constitutional authority so to do, should it see fit.

Shortly speaking, the argument of these four dissenting justices was as follows: "Congress," they said, "has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all power essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns.

[21] *Ex parte* Milligan, 4 Wall. 2; 18 L. ed. 281.

That power and duty belong to the President as commander-in-chief. . . . We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists. Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine to what States or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety. . . . It was for Congress to determine the question of expediency."

The fact that the civil courts were open and undisturbed in the execution of their functions is not to be taken as conclusive evidence that the exercise of martial law is unnecessary, it is argued, for, it is pointed out, it may often happen that courts, though open and undisturbed in the execution of their functions, may in fact be entirely unable to avert threatened danger, or to punish with adequate promptitude guilty conspirators. Especially in time of civil war, it is observed, the very judges and marshals of the courts may be in more or less active sympathy with the rebels.

It will be seen that, according to the reasoning of these justices, necessity is still the test by which is to be declared the legality of military acts when the citizen is thereby affected either in his person or property. But this necessity, it is argued, is one which it is the province of Congress conclusively to determine, the only limit upon its discretionary powers in this respect being that somewhere war must exist, to which the United States is a party. Whenever, then, such a war does exist, Congress, it is held, if it sees fit, so far as the judiciary may properly prevent, may at once suspend the writ of habeas corpus and generally supersede civil by military government throughout the length and breadth of the land. Its judgment, and not the actual facts of the case, is to determine the presence of that necessity which furnishes the

justification for refusing to the individual that protection to his person and property which the civil law affords him.[22]

Furthermore these four justices assert that the effect of a suspension of the writ of habeas corpus is not simply to deny it to one held in custody, but affirmatively to authorize the executive to arrest as well as to detain.

As opposed to the position taken by these four justices, the majority of the court in the Milligan case assert, first, that no legislative fiat is sufficient to create a necessity for the exercise of martial law when no such necessity in fact exists, and, second, that the circumstance that the ordinary courts are open and undisturbed in the execution of their functions is conclusive evidence of the fact that there is not present a necessity for martial law.

After stating the facts of the case, and declaring that no graver question than the one involved, no one which more nearly concerns the rights of the whole people, was ever before the court, the majority begin their argument by pointing out that the Constitution is a law for rulers and ruled in war as well as in peace, and that "no doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." With war comes the necessity for the exercise of certain powers latent in the government, but in no case is there created a right upon its part to try and punish the citizen, charged with crime, in any other manner than that provided by law. The opinion continues:

"It is said that the jurisdiction [of the military commission] is complete under the 'laws and usages of war.' It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in States which have upheld

[22] The position of these four justices in the Milligan case is thus, in this respect, quite analogous to that originally taken by the Supreme Court in Munn v. Illinois, 94 U. S. 113; 24 L. ed. 77, but later abandoned, that the determination by the legislature of what is a reasonable rate to be charged for services by industries affected with a public interest is conclusively binding upon the courts.

the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our National Legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress and not composed of judges appointed during good behavior. . . . It is claimed that martial law covers with its broad mantle the proceedings of this Military Commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

"If this position is sound to the extent claimed, then, when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed and certain rules.

"The statement of this proposition shows its importance: for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guaranty of the Constitution, and effectually renders the 'military independent of and superior to the civil power'— the attempt to do which by the King of Great Britain was deemed by our fathers such an offense, that they assigned it

to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable and, in the conflict, one or the other must perish.

" . . . It is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of habeas corpus. In every war, there are men of previously good character wicked enough to counsel their fellow citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit, in the exercise of a proper discretion, to make arrests, should not be required to produce the person arrested in answer to a writ of habeas corpus. The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of common law. If it had intended this result, it was easy by the use of direct words to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it would be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.

"It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on States in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late Rebellion, required that the loyal States should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theater of military operations; and, as in this case, Indiana had been and was again threatened by invasion by the enemy the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.

"It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration, for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and

unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."

§ 734. Criticism.

There would seem to be but little question but that the doctrine stated by the majority in the Milligan case is essentially a sound one, namely, that actual necessity and not constructive necessity as determined by legislative declaration, alone will furnish justification for substituting martial for civil law. It would seem, however, that in one respect the opinion is open to criticism. The statement is too absolutely made that "martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." It is correct to say that "the necessity must be actual and present," but it is not correct to say that this necessity cannot be present except when the courts are closed and deposed from civil administration, for, as the minority justices correctly point out, there may be urgent necessity for martial rule even when the courts are open. The better doctrine, then, is, not for the court to attempt to determine in advance with respect to any one element, what does, and what does not create a necessity for martial law, but, as in all other cases of the exercise of official authority, to test the legality of an act by its special circumstances. Certainly the fact that the courts are open and undisturbed will in all cases furnish a powerful presumption that there is no necessity for a resort to martial law, but it should not furnish an irrebuttable presumption.

The English doctrine of martial law is substantially similar to this, and an excellent illustration of the point under discussion is given by certain events growing out of the late British-Boer war.

During that struggle martial law was proclaimed by the British Government throughout the entire extent of Cape Colony, that is, in districts where no active military operations were being conducted and where the courts were open and undisturbed, but where considerable sympathy with the Boers and disaffection with

the English rule existed. Sir Frederick Pollock, discussing the proper law of the subject with reference to the arrest of one Marais, upholds the judgment of the Judicial Committee of the Privy Council (A. C. 109, 1902) in which that court declined to hold that the absence of open disorder, and the undisturbed operation of the courts furnished conclusive evidence that martial law was unjustified.[23]

§ 735. Mitchell v. Clark Considered.

In 1863 Congress passed an act for the protection of military persons against suits for certain acts done by them during the war without authority of law. The fourth section of this law read:

"And be it further enacted, that any order of the President or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress, and such defence may be made by special plea, or under the general issue." [24]

There would seem to be little question as to the unconstitutionality of this law, should it be interpreted in as wide a sense as its language permits; for giving to its words the full meaning which they are capable of bearing, they assert the power of the legislature to justify acts of military officers without reference to their necessity, in other words, to substitute a legislative fiat for a justification in fact.

The validity of this act was questioned in the case of Mitchell v. Clark.[25] In this case the plaintiff sued the defendant for rent due on a lease of certain warehouses. The defendant, admitting the lease, set up that the rent in question had been paid by him,

[23] *Law Quarterly Review*, XVIII, 152. For an opposite view, see *Edinburgh Review*, January, 1902.

[24] By act of May 11, 1866, this provision was given still wider application.

[25] 110 U. S. 633; 4 Sup. Ct. Rep. 170; 28 L. ed. 279.

under military orders, to certain military officials, and by them confiscated for the use of the United States. Whether or not this payment by the defendant constituted a payment of the rent due of course depended upon the lawfulness of its confiscation by the military authorities, which in turn depended upon the validity of the act of Congress of 1863. In upholding the potency of the act to legitimize the confiscation, the Supreme Court said:

"That an act passed after the event, which in effect ratifies what has been done and declares that no suit shall be sustained against the party acting under color of authority, is valid, so far as Congress could have conferred such authority before, admits of no reasonable doubt."

There can be no objection to this statement that Congress, after an event, has the power, by an act of indemnity, to declare that no suit shall be based upon an act which it might have at the time authorized. This, it has been claimed, is all that that case decided.[26] It would seem to the author, however, that a broader and more questionable doctrine was necessarily involved, in that, in a loyal State, removed from the seat of active hostilities, the court justified, not upon the basis of necessity, but of legislative sanction, an act of spoliation.[27]

§ 736. Habeas Corpus.

The writ of habeas corpus ad subjiciendum is one of a number of so-called extraordinary judicial writs, which like those of certiorari, quo warranto, mandamus and injunction are issued by the courts either in order that their commands may be executed, or that a matter may be brought before them for judicial determination. This especial writ, often termed "the writ of liberty," had become one of the established rights of the citizen before the separation of the American colonies from the mother country, and has ever since been regarded by American citizens as the greatest

[26] C. N. Lieber, "The Justification of Martial Law," in the *North American Review*, 1896.

[27] See dissenting opinion of Justice Field and the comments of Hare in his *American Constitutional Law*, pp. 972 *et seq.*

of the safeguards erected by the civil law against arbitrary illegal imprisonment by whomsoever the detention may be cised or ordered. Issued as of right (*ex debito justitiæ*)[28] any court of competent jurisdiction, it orders those to who is directed to show good legal justification for holding in cus the person in whose favor it is given. Where such sufficient c is not shown, an order of release follows as of course.[29]

§ 737. Suspension of the Writ.

The United States Constitution declares that "The privi of the writ of habeas corpus shall not be suspended, unless w in cases of rebellion or invasion the public safety may req it."[30] The implication from this language is that the writ s not be suspended, except in the cases mentioned. The prol tion is directed only to the Federal Government. Aside, th fore, from the specific provisions of their several constituti the States are free to suspend the writ, but in case they d and without sufficient excuse, the person detained may, of cou obtain the writ from a federal court under the claim that h deprived of liberty without due process of law.

The suspension of the privilege of the writ, it is to be obser does not deprive the courts of the right to issue it. It furni merely a legal ground for a refusal to obey it.[31]

Furthermore, the suspension of the writ goes no further t to justify this refusal. It thus enables executive agents to m arrests at will, and, while the suspension is in force, rende impossible for those apprehended to obtain a judicial judgm upon the legality of such arrests and detention. But it does operate actually to authorize such arrests,[32] or to deprive individual of any of the other rights which the law secures

[28] But not of course, for the petition must set out a cause for its issu

[29] The jurisdiction of the federal courts with reference to the issuan the writ has been considered in an earlier chapter. Chapter VIII.

[30] Art. I, Sec. 9, Cl. 2.

[31] *Ex parte* Vallandigham, I Wall. 243; 17 L. ed. 589.

[32] The four minority justices in the Milligan case asserted, though, it seem improperly, that the suspension of the writ does have this effect.

and, therefore, the persons responsible for the arrests and detention may still be held civilly and criminally responsible for any illegal acts that they may have committed. In time of war, or of domestic insurrection or disorder, when so-called martial law has been declared, the privilege of the writ of habeas corpus, together with all the other civil guarantees may, for the time being, be suspended; but, as we have already learned in the preceding chapter, actual public necessity, and this alone, will furnish legal justification for this.

The existence of civil war operates as regards the enemy *ipso facto,* that is, without formal declaration, as a suspension of the privilege of the writ of habeas corpus, together with, as said, the suspension of the other guarantees to the individual against arbitrary executive action. In the preceding chapter the principle was sustained that the establishment of martial law may properly take place not only upon the theater of active hostilities, but elsewhere when the actual necessities of the case demand it.

The suspension of the privilege of the writ of habeas corpus falls short of the establishment of martial law, but to justify it there is required the same public necessity as that required for the enforcement of martial law. The same reasoning, therefore, that was employed with reference to this latter subject is applicable to the question of the suspension of the writ of habeas corpus, and need not here be repeated.

§ 738. Power of the President to Suspend its Writ.

In *Ex parte* Bollman[33] the Supreme Court in its opinion took for granted that the power of suspension lay with Congress, and the same view was held by Story in his *Commentaries.*[34]

In the Bollman case Marshall said: "If at any time the public safety should require the suspension of the powers vested by this

[33] 4 Cr. 75; 2 L. ed. 554.

[34] § 1336. Story says: "Hitherto no suspension of the writ has ever been authorized by Congress since the establishment of the Constitution. It would seem, as the power is given to Congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body."

act [granting jurisdiction] in the courts of the United States, it is for the legislature to say so. The question depends on political considerations, on which the Legislature is to decide. Until the legislative will be expressed, this court can only see its duty and must obey the laws."

The correctness of this view does not appear to have been questioned until the early period of the Civil War, when President Lincoln, upon the advice of his Attorney-General, declared that the power lay with him, and by various proclamations authorized the suspension of the writ in places both within and without the area of active hostilities.[35]

The rightfulness of this assumption of power by the President was severely criticised notwithstanding the arguments of the Attorney-General and of the eminent jurist Horace Binney. This criticism was judicially expressed by Chief Justice Taney in a protest which he filed in the case of *Ex parte* Merryman.[36]

In that case obedience to a writ which he had issued being refused by a military officer of the United States, acting under the authority of the President, Taney recognized his inability to compel its execution and filed a protesting opinion in the course of which, after calling attention to the fact that the constitutional provision providing for the suspension of the writ is found in the article which is devoted to the legislative department and is, therefore, to be presumed to relate to the powers of Congress, he said: "The only power, therefore, which the President possesses, where the 'life, liberty or property' of a private citizen are concerned, is the power and duty prescribed in the third section

[35] For an able argument sustaining this position, see the three pamphlets issued in 1862, 1863, and 1865 by Horace Binney, entitled "The Principles of the Writ of Habeas Corpus" For other discussions see the article by Joel Parker, entitled "Habeas Corpus and Martial Law," in the *North American Review*, October, 1861; that by S. G. Fisher in the *Political Science Quarterly*, vol. III, p. 454, entitled "The Suspension of Habeas Corpus during the War of the Rebellion" (criticising Binney); the pamphlet "Executive Power," by B. R. Curtis, reprinted in the second volume of his *Life*, and also in the second volume of Curtis' *Constitutional History of the United States* (ed. 1896).

[36] Taney's Reports, 246.

of the second article, which requires 'that he shall take care that the laws shall be faithfully executed.' He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the Constitution. It is thus made his duty to come to the aid of the judicial authority if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm. But in exercising this power he acts in subordination to judicial authority, assisting it to execute the process and enforce its judgments.

"With such provisions in the Constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the President, in any emergency or in any state of things, can authorize the suspension of the privilege of the writ of habeas corpus or arrest a citizen except in aid of the judicial power. He certainly does not faithfully execute the law if he takes upon himself legislative power by suspending the writ of habeas corpus, and the judicial power also by arresting and imprisoning a person without due process of law. Nor can any argument be drawn from the nature of sovereignty, or the necessity of government, for self-defense in times of tumult and danger. The Government of the United States is one of delegated and limited powers. It derives existence and authority altogether from the Constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted."

That Taney's reasoning is correct there would now seem to be little question. The point has never been since squarely passed upon by the courts, but in 1863 Congress considered it necessary specifically to authorize the President to suspend the writ, and commentators now agree that the power to suspend or authorize the suspension lies exclusively in Congress. Winthrop in his *Military Law,* summing up his review of the subject, says: "Thus, as a general principle, it may be deemed settled by the rulings of

the courts and weight of legal authority, as well as by the action of Congress and practice of the Executive, that the President is not empowered of his own authority to suspend the writ of habeas corpus, and that a declaration of martial law made by him or a military commander, in a district not within the theatre of war, will not justify such suspension in the absence of the sanction of Congress." [37]

[37] See also especially the argument by Tucker in his *Constitution of the United States*, II, pp. 642–652.

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American Administrative Law, p. 35.
8; 26 L. ed. 377.

of our constitutions, and doubtless the continuance of reg
liberty depends on maintaining these boundaries."[4]

Under the influence of this doctrine most of the States i
first Constitutions incorporated what have since been kno
"distributing clauses." Thus Massachusetts in her Consti
adopted in 1780, provided that "in the government of thi
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executive and judicial powers or either of them; the exe
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powers or either of them; to the end that it may be a gover
of laws and not of men." Maryland in her first instrum
government declared "that the legislative, executive and ju
powers of government ought to be forever separate and d
from each other," and New Hampshire provided that "the
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from and independent of each other as the nature of a fre
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indissoluble bond of unity and amity."

In practically all of the state constitutions which hav
adopted since the revolutionary period there have been eith
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courts, and the executive in the executive organs therein c
A number of constitutions, however, are careful to state th
principle of absolute separation is not to apply in those ca
which express provision otherwise is made.

§ 740. Separation of Powers in the States not Compelled Federal Constitution.

It is to be observed that this general acce the
of the principle of the separation of powers force
them by federal law,[5] except in so far a bition

[4] For these and other quotations see the val of D
Separation of Powers.

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Fourteenth Amendment with reference to the depriving any person of life, liberty, or property without due process of law is concerned or possibly, in extreme cases, where it might be held that the government is not republican in form. Nor, as we shall later see, do the distributing clauses in the state constitutions operate to prevent the consolidation of judicial, executive, and legislative powers in local government organs.[6]

§ 741. Powers Separated in the Federal Government.

The federal Constitution does not contain a specific distributing clause, but its equivalent is found in the clauses which provide that "all legislative power herein granted shall be vested in a congress of the United States," that "the executive power shall be vested in a President of the United States of America," and that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish."

These provisions interpreted in the light of the accepted doctrines that each and all of the federal organs of government possess only those powers granted them by the Constitution, and that the powers not granted may not by them be delegated to other and different organs, have, from the beginning, been held to secure what the specific distributing clauses in the state constitutions are designed to provide. In the case of Kilbourn v. Thompson[7] the court say: "It is believed to be one of the chief merits of the American system of written constitutional law that all powers intrusted to the government, whether state or national, are divided into the three grand departments, the executive, the legislative and the [illegible]icial; that the functions appropriate to each of these bran[illegible] [illegible]vernment shall be vested in a separate body of public [illegible] [illegible]nd that the perfection of that system requires that the [illegible]ch separate [illegible] divide these departments shall be b[illegible] clearly defi[illegible] [illegible] also essential to the successful [illegible] the system [illegible] persons intrusted with power in

[illegible]w, Americ[illegible] [illegible]ive Law, p. 35.
[illegible] 168; 26 [illegible]

any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no others." [8]

To preserve the separation of powers and to render government efficient for the protection of civil liberty, the framers of our federal and state constitutions saw that it was necessary not simply to create separate depositaries for the three powers, but that means should be provided for preventing, if possible, the control by one department of the other departments. With this end in view the executive, legislative, and judicial establishments are made as independent as possible of one another. Thus the legislatures are made the sole judges as to the constitutional qualifications of those claiming membership, they have the power of disciplining and expelling members, their members are in general not liable to arrest except for felony, treason, or breach of the peace, and they may not be held responsible in actions of slander or libel for words spoken or printed by them as members. The independence of the courts is in general secured by tenures of office, and official compensation free from legislative control, and, furthermore, they have the great power of declining to recognize all laws or executive acts which they hold to be unconstitutional or otherwise illegal. The executive has, of course, within its own hands, the material force of the State, and within the limits of the discretion placed by law within his hands, may not be held legally responsible in the courts for his acts.

§ 742. Separation of Powers not Complete.

While, as has been said, the principle of the separation of powers has generally been accepted as binding in our systems of constitutional jurisprudence — state and national — the practical necessities of efficient government have prevented its complete application. It has from the beginning been necessary to vest in

[8] The principle of the separation of powers does not limit Congress when providing governments for the Territories, for as to this Congress has complete discretion.

each of the three departments of government certain powers which, in their essential nature, would not belong to it. Thus, to mention only a few of the more evident examples, the courts have been given the essentially legislative power to establish rules of practice and procedure, and the executive power to appoint certain officials — sheriffs, criers, bailiffs, clerks, etc.; the executive has been granted the legislative veto power, and the judicial right of pardoning; the legislature has been given the judicial powers of impeachment, and of judging of the qualifications of its own members, and the Senate, the essentially executive power of participating in the appointment of civil officials.

Not only this, but as we shall later see, the principle of the separation of powers does not prevent the legislative delegation to executive officers both of a considerable ordinance-making power, and of authority to pass, with or without an appeal to the courts, upon questions of fact. Essentially, the promulgation of administrative orders or ordinances is legislative in character, and the determination of facts after a hearing is judicial. In both cases, however, these functions are performed in pursuance of statutory authority, and as incidental to the execution of law. In like manner, the legislature is conceded to have, as incidental to its law-making power, the essentially judicial function of punishing for contempt or disobedience to its orders.

§ 743. The General Principle Stated.

Thus it is not a correct statement of the principle of the separation of powers to say that it prohibits absolutely the performance by one department of acts which, by their essential nature, belong to another. Rather, the correct statement is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution, been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental functions, unless such powers are properly incidental to the performance by it of its own appropriate functions.

From the rule, as thus stated, it appears that in very many c the propriety of its exercise of a power by a given departr does not depend upon whether, in its essential nature, the pc is executive, legislative, or judicial, but whether it has specifically vested by the Constitution in that department whether it is properly incidental to the performance of the propriate functions of the department into whose hands its e cise has been given.

Generally speaking, it may be said that when a power is peculiarly and distinctly legislative, executive, or judicial, it within the authority of the legislature to determine where its e cise shall be vested.

§ 744. Distinction Between Legislative and Judicial Acts.

In a dissenting opinion rendered in the Sinking Fund Ca Justice Field says: "The distinction between a judicial legislative act is well defined. The one determines what the is, and what rights the parties have with reference to transact already had; the other prescribes what the law shall be in fu cases arising under it. Whenever an act undertakes to deterr a question of right or obligation, or of property, the founda upon which it proceeds, such act is, to that extent, a judicial and not the proper exercise of legislative functions."

In Taylor v. Place[10] the court say: "The judicial powe exercised in the decision of cases; the legislature in making eral regulations, by the enactment of laws. The latter acts f consideration of public policy; the former is guided by the pl ings and evidence in the cases."

In further distinction of the two functions it might be ac that legislative action is initiated by the enacting body, whe the judiciary may act only when called upon to do so, and the former acts upon its own knowledge, the latter upon know given to it.[11]

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[9] 99 U. S. 700; 25 L. ed. 496.

[10] 4 R. I. 324.

[11] *Cf.* a paper entitled "The Distinction between Legislative and Ju Functions," in *Report of the American Bar Association*, 1885, p. 261.

§ 745. Declaratory and Retroactive Legislation.

The foregoing distinctions support the doctrines that have been established with reference to the legislative enactment of declaratory and retroactive statutes.

Declaratory statutes, that is, those legislative pronouncements as to how certain laws, previously established, are to be interpreted in courts and by executive agents, are valid only in so far as they are designed to govern future action. Cooley states the law upon this point as follows: "If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and can not be done by a mandate to the courts which leaves the law unchanged, but seeks to compel the courts to construe and apply it not according to the judicial, but according to the legislative judgment.

"But in any case the substance of the legislative action should be regarded rather than the form; and if it appears to be the intention to establish by declaratory statute a rule of conduct for the future, the courts should accept and act upon it, without too nicely inquiring whether the mode by which the new rule is established is or is not the best, most decorous and suitable that could have been adopted." [12]

"If," continues Cooley, "the legislature can not thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it can not do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry."

Retroactive legislation which does not impair vested rights, or violate express constitutional prohibitions, is valid, and, therefore, particular legal remedies, and, to a certain extent, rules of evidence, may be changed and, as changed, made applicable to past transactions, for it is held that, so long as the general requirements of due process of law are satisfied, no person has a vested right in any particular legal remedy or mode of judical procedure.

[12] *Constitutional Limitations*, 7th ed., p. 137.

Again, in certain cases, the legislature is competent to validate proceedings otherwise invalid because of formal irregularities. But substantial rights may not thus be interfered with. To quote again from Cooley: "The legislature does, or may, prescribe the rules under which the judicial power is exercised by the courts; and in doing so it may dispense with any of those formalities which are not essential to the jurisdiction of the court; and whatever it may dispense with by statute anterior to the proceedings, we believe it may also dispense with by statute after the proceedings have been taken, if the court has failed to observe any of those formalities. But it would not be competent for the legislature to authorize a court to proceed and adjudicate upon the rights of parties, without giving them an opportunity to be heard before it; and, for the same reason it would be incompetent for it, by retrospective legislation, to make valid any proceedings which had been had in the courts, but which were void for want of jurisdiction over the parties." [13]

In Mitchell v. Clark[14] was involved the constitutionality of a statute of 1863, by which Congress had declared: "That any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defense in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any such seizure, arrest or imprisonment, made, done or committed, or acts omitted to be done under and by virtue of such order, or under color of any law of Congress, and such defense may be made by special plea or under the general issue;" and "That no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespass or wrongs done or committed, or act omitted to be done, at any time during the present rebellion by virtue or under color of any authority derived from or exercised by or under the President of the United States, or by or under any act of Congress unless the same shall be commenced within two years next after such arrest, imprisonment, trespass or wrong may have

[13] *Op. cit.* 150.
[14] 110 U. S. 633; 4 Sup. Ct. Rep. 170; 28 L. ed. 279.

been done or committed, or act may have been omitted to be done."

Notwithstanding the very broad language of this act of immunity, the constitutionality of the measure was sustained. The court was, however, careful, in its opinion, to restrict its operation to the validation only of acts that it might have been possible for the President or Congress to have authorized at the time they were committed. Thus the opinion declares: "That an act passed after the event, which in effect ratifies what has been done and declares that no suit shall be sustained against the party acting under color of authority, is valid, so far as Congress could have conferred such authority before, admits of no reasonable doubt. These are ordinary acts of indemnity passed by all governments when the occasion requires."

§ 746. Legislative Control of Judicial Procedure and Powers.

The power of the courts to refuse to apply legislative acts inconsistent with constitutional provisions has already been considered. This is as far as the courts will go in the control of the legislative department. They do not possess and have never claimed to possess the power to pass upon the credentials of one claiming membership in a legislative body. They do not attempt to regulate the rules by which such bodies are governed in the conduct of their work, and, to only a very limited extent, will they question the correctness of the legislative records that are kept. Finally, they never attempt to command or to prohibit the performance of a legislative act. Individually, however, the members of a legislature are, of course, subject to judicial process, except so far as they have been granted express immunity by the Constitution.

Upon the other hand, as we shall see, the courts have not hesitated to protect their own independence from legislative control, not simply by refusing to give effect to retroactive declaratory statutes, or to acts attempting the revision or reversal of judicial determinations, but they have refused themselves to entertain jurisdiction in cases in which they have not been given the power

to enforce their decrees by their own writs of execution. T
as already mentioned, they have refused to act where thei
cisions have been subject to legislative or administrative revis
Finally, even where the extent of their jurisdiction, both
parties litigant and subject-matter, has been subject to legisl
control, the courts have not permitted themselves to be dep
of the power necessary for maintaining their dignity, the or
ness of their procedure, and the effectiveness of their writs.

In order that a court may perform its judicial functions
dignity and effectiveness, it is necessary that it should po
certain powers. Among these are the right to issue certain w
called extraordinary writs, such as mandamus, injunction,
tiorari, prohibition, etc., and, especially, to punish for cont
and disobedience to its orders. The possession of these power
courts have jealously guarded, and in accordance with the co
tutional doctrine of the separation and independence of the
departments of government, have held, and undoubtedly will
tinue to hold, invalid any attempt on the part of the legisl
to deprive them by statute of any power the exercise of w
they deem essential to the proper performance of their ju
functions. The extent of their jurisdiction, they argue, m
more or less within legislative control, but the possession of po
for the efficient exercise of that jurisdiction, whether statuto
constitutional, which they do possess, they cannot be deprive

§ 747. Jurisdiction and Judicial Power Distinguished.

It has been already pointed out that the jurisdictions of th
ferior federal courts and the appellate jurisdiction of the Sup
Court is wholly within the control of Congress, depending as
do upon statutory grant. It has, however, been argued that
the extent of this jurisdiction is thus within the control o
legislature, that body may not control the manner in whicl
jurisdiction which is granted shall be exercised, at least to
extent of denying to the courts the authority to issue writs
take other judicial action necessary for the proper and effe
execution of their functions. In other words, the argume

that while jurisdiction is obtained by congressional grant, judicial power, when once a court is established and given a jurisdiction, at once attaches by the direct force of the Constitution.

This position was especially argued by Senators Knox, Spooner, and Culberson and contested by Senator Bailey during the debate upon the Hepburn Railway Rate Bill of 1906. The point at issue was the constitutionality of the amendment offered by Senator Bailey providing that no rate or charge, regulation or practice, prescribed by the Interstate Commerce Commission, should be set aside or suspended by any preliminary or interlocutory decree or order of a circuit court.[15]

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[15] An interesting discussion of this point is that by Mr. J. W. Bryan in the *American Law Review*, XLI, 51, in an article entitled "The Constitutional Aspects of the Senatorial Debate upon the Rate Bill." Mr. Bryan's conclusion, which seems an eminently satisfactory one, is that while Congress may, within its discretion, refuse to the inferior federal courts jurisdiction, it cannot compel them to administer a judicial power from which any essential elements have been abstracted; and, therefore, in each case, it is open to the court to refuse to proceed in suits where, in its opinion, it has been denied by Congress sufficient authority and power to give the parties litigant due process of law; that is, adequately to protect their rights and enforce the judgments or decrees that may be rendered.

In State v. Morrill (16 Ark. 384) the Supreme Court of Arkansas declare: "The legislature may regulate the exercise of, but cannot abridge, the express or necessarily implied powers granted to this court by the Constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government; and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the federal and state institutions, and a favorite theory in the government of the American People. As far as the act in question goes, in sanctioning the power of the courts to punish as contempts the 'acts' therein enumerated, it is merely declaratory of what the law was before its passage. The prohibitory feature of the act can be regarded no more than the expression of a judicial opinion by the legislature that the courts may exercise and enforce all their constitutional powers, and answer all the useful purposes of their creation, without the necessity of punishing as a contempt any matter not enumerated in the act. As such, it is entitled to great respect, but to say that it is absolutely binding upon the courts, would be to concede that the courts have no constitutional and inherent power to punish any class of contempts, but that the whole subject is under the control of the legislative department; because, if the General Assembly may deprive the courts of power to punish one class of contempts, it may go the whole length, and divest them of power to punish any contempt." To same effect is Carter v. Com. of Va., 96 Va. 791.

§ 748. Powers of Courts to Punish Contempts.

While recent years the question of the constitutional extent of the legislative control over the powers of the courts has been discussed with special reference to the regulation of the courts' power to punish for contempt and to issue writs of injunction.[16]

That, generally speaking, the power to punish for contempt is inherent in courts is beyond question. It may, however, be argued that where the existence and jurisdiction of a court are wholly within the control of the legislative body, as is the case with the inferior federal courts, authority exists in the legislature to determine the circumstances under which contempt may be held to have been committed, the form of trial therefor and the punishment which, upon conviction, may be inflicted. The power has, indeed, in a measure, been exercised by Congress which by law of March 2, 1831,[17] limited the contempt powers of the federal courts to three classes of cases: (1) Those where there has been misbehavior in the presence of the court, or so near thereto as to interfere with the orderly performance of its duties; (2) where there has been misbehavior of an officer of the court with reference to official transactions; and (3) where there has been disobedience or resistance to any lawful writ, process, order, rule, decree, or command of the court.

The constitutionality of this law does not seem to have been questioned, but it may well be questioned whether it could constitutionally be held to control the Supreme Court which derives its existence and much of its jurisdiction directly from the Constitution.[18]

§ 749. Pardoning Powers of the President and Contempts.

Arguing from the general principle of the independence of the three departments of government it would seem that the question as to the power of the President to pardon persons adjudged by

[16] *Cf. Harvard Law Review*, XIII, 615, article, "Constitutional Regulation of Contempt of Court," by Wilbur Larremore.

[17] 4 Stat. at L. 487.

[18] *Cf. Ex parte* Robinson, 6 McLean, 355.

one of the federal courts to be in contempt should be answered in the negative, for clearly to give the power to the executive is to place in his hands a weapon with which he may completely nullify the court's power to enforce its decrees. To this it may be replied, however, that, having the direction of the armed forces of the nation he has the power in any event, and the Constitution vesting in him the general power "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," it would seem to follow that the power to remit the punishment of those convicted by the federal courts of contempt is given.

With reference to this, however, there is a distinction to be made between criminal and so-called civil contempts. In civil contempts the defendant is fined or imprisoned in order to obtain for a suitor his private rights. Punishment for criminal contempts, upon the other hand, is imposed to uphold and vindicate the dignity of the court. Though the Supreme Court has never passed directly upon this point, there would seem to be no doubt but that the pardoning power of the President extends at least to persons punished for criminal contempts. In 1902 in *Re* Nevitt[19] the circuit court of appeals for the eighth circuit held that the President might pardon criminal contempts, and intimated that the same was true as to civil contempts. But this would seem to be a doubtful doctrine. Attorneys-General Gilpin and Mason have both held that the President may pardon criminal contempts,[20] and in a number of cases the Supreme Court has treated as criminal actions, cases involving criminal contempts.[21]

Where the point has been raised in the state courts, they have with unanimity held that the governor has the power in question.[22]

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[19] 117 Fed. Rep. 448.

[20] Dixon's Case, 3 Op. Atty.-Gen. 662; 4 Op. Atty.-Gen. 458. See *Columbia Review*, III, 45.

[21] *Ex parte* Kearney, 7 Wh. 38; 5 L. ed. 391; New Orleans v. Steamship Co., 20 Wall. 387; 22 L. ed. 354.

[22] See Sharp v. State, 49 S. W. Rep. 752, where the authorities are cited.

§ 750. Power of Congress to Punish for Contempt.

In 1821 the Supreme Court by a decision rendered in the of Anderson v. Dunn[23] recognized the existence in Congress general power to punish for contempt persons disobeyin orders, especially those with reference to the giving of testi and the production of papers before its committees and con sions of inquiry. In the case of Kilbourn v. Thompson,[24] ever, decided in 1881, the court very much narrowed this p holding that Congress had the power to compel information with reference to matters over which it had legislative power that, therefore, it might not punish for contempt a refus testify or produce papers bearing upon other subjects. In respect, being a legislature of limited powers, Congress coul measure its powers by those exercised by the English Parliar Applying the foregoing principles the court in its opinion "In looking to the Preamble and Resolution under which the mittee acted, before which Mr. Kilbourn refused to testify, w of the opinion that the House of Representatives not only exce the limit of its own authority but assumed a power which only be properly exercised by another branch of the governi because the power was in its nature clearly judicial."

That Congress has the power to punish its own member disorderly behavior, that it may punish by imprisonment a re to obey a rule made by it for the preservation of its own c and inflict penalties in order to compel the attendance of a members has not to be questioned. In the case *Re* Chapm however, decided in 1897, was raised the question whether i the authority to punish a refusal to testify before a comm which was inquiring not with regard to proposed legislation with reference to the truth of charges which had been mad flecting upon the integrity of certain of its members. This p the court upheld.[26]

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[23] 6 Wh. 204; 5 L. ed. 242.

[24] 103 U. S. 168; 26 L. ed. 377.

[25] 166 U. S. 661; 17 Sup. Ct. Rep. 677; 41 L. ed. 1154.

[26] The court say: "In Kilbourn v. Thompson (103 U. S. 168; 26 L. ed among other important rulings, it was held that there existed no g power in Congress, or in either House, to make inquiry into the p

The court, furthermore, held in this case that having the power, Congress might, instead of or in addition to itself punishing for contempt, provide by law that a contumacious witness be indicted and punished in the courts for a misdemeanor.

With reference to the authority of the state legislatures to punish for contempt it may be observed that their powers are much

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affairs of a citizen; that neither House could, on the allegation that an insolvent debtor of the United States was interested in a private business partnership, investigate the affairs of that partnership, as a mere matter of private concern; and that consequently there was no authority in either House to compel a witness to testify on the subject. The case at bar is wholly different. Specific charges publicly made against senators had been brought to the attention of the Senate, and the Senate had determined that investigation was necessary. The subject-matter as affecting the Senate was within the jurisdiction of the Senate. The questions were not intrusions into the affairs of the citizen; they did not seek to ascertain any facts as to the conduct, methods, extent or details of the business of the firm in question, but only whether that firm, confessedly engaged in buying and selling stocks, and the particular stock named, was employed by any senator to buy or sell for him any of that stock, whose market price might be affected by the Senate's action. We cannot regard these questions as amounting to an unreasonable search into the private affairs of the witness simply because he may have been in some degree connected with the alleged transactions, and as investigations of this sort are within the power of either of the two Houses they cannot be defeated on purely sentimental grounds.

"The questions were undoubtedly pertinent to the subject-matter of the inquiry. The resolutions directed the committee to inquire 'whether any senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate.' What the Senate might or might not do upon the facts when ascertained, we cannot say, nor are we called upon to inquire whether such ventures might be defensible, as contended in argument, but it is plain that negative answers would have cleared that body of what the Senate regarded as offensive imputations, while affirmative answers might have led to further action on the part of the Senate within its constitutional powers.

"Nor will it do to hold that the Senate had no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion, if certain facts were disclosed by the investigation. The matter was within the range of the constitutional powers of the Senate. The resolutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation and punishment. The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member."

broader than those of Congress. Possessing all powers not pressly or impliedly refused them, they have a general inqu torial power and a corresponding general authority to punis refusal to testify or to produce papers.

§ 751. The Performance of Administrative Acts by the Cou

Courts have no hesitation in performing ministerial acts, such acts are incidental to the exercise of their proper judic functions. But they will not perform administrative acts not connected.

In Hayburn's case[27] the federal circuit judges before whom question was raised unanimously refused, as directed by an act Congress, to inquire into and to take evidence as to the claims invalid pensioners and to submit their findings for final action the Secretary of War, on the ground that inasmuch as their a were made reviewable by an executive officer they could not deemed judicial in character.

In United States v. Ferreira[28] the Supreme Court held that act of Congress that gave to the District Judge of Florida authority to pass upon certain claims, which decisions were be reported to the Secretary of the Treasury for his discretion action thereupon, gave to such judge not judicial but admi trative powers, and that, therefore, when so acting, he sat a commissioner and not as a court, and, consequently, that an app would not lie from his decisions to the Supreme Court. T opinion declares: "The powers conferred by these acts of C gress upon the judge, as well as the Secretary, are, it is tr judicial in their nature; for judgment and discretion must exercised by both of them. But it is nothing more than the po ordinarily given by law to a commission appointed to adj claims to lands or money, under a treaty; or special powers inquire into or decide any particular class of controversies which the public or individuals may be concerned. A power

[27] 2 Dall. 409; 1 L. ed. 436.
[28] 13 How. 40; 14 L. ed. 42.

this description may constitutionally be conferred on a secretary as well as a commissioner, but is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States."

In the case of Gordon v. United States[29] the Supreme Court refused to review the action of the Court of Claims in respect to a claim examined and allowed by it under an act of Congress which provided that no money should be paid out of the Treasury for any claim passed upon by the Court of Claims until after an appropriation therefor had been estimated by the Secretary of the Treasury and an appropriation to pay it made by Congress. The appeal of Gordon was dismissed on the ground that Congress could not "authorize or require this [the Supreme] court to express an opinion in a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect." "The award of execution," said the Chief Justice, "is a part and an essential part of every judgment passed by a court having judicial power. It is no judgment in the legal sense often without it. Without such an award the judgment would be inoperative and nugatory leaving the aggrieved party without a remedy. It would be merely an opinion which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court in the exercise of its appellate jurisdiction; yet it is the whole power that the court is allowed to exercise under this Act of Congress."[30]

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[29] 2 Wall. 561; 17 L. ed. 921. See, also, 117 U. S. Appex. 697.

[30] In the case of *Re* Sanborn (148 U. S. 222; 13 Sup. Ct. Rep. 577; 37 L. ed. 429) the same doctrine was applied to substantially similar facts. It may be remarked that, though the fourteenth section of the original act of 1863 has been repealed, and the Supreme Court now entertains appeals from the Court of Claims, the judgments are not even now, strictly speaking, self executory, an appropriation by Congress for their payment being required, which appropriations are made at the suggestion of the heads of departments out of whose proceedings the claims have arisen.

§ 752. Judicial Review of Administrative Determinations.

Though, as the foregoing cases show, the courts will not c sent to exercise jurisdiction where their decisions are reviewa by administrative officials, they have not refused themselves review decisions rendered in the first instance by executive orga In all cases they will, of course, examine, by certiorari or oth wise, whether a given administrative act has been legal in char ter, that is, whether the agent performing it has had the necess official power, or whether "due process of law" has been p vided.[31] In addition they have been willing, where specific leg lative authority has been granted them, to review administrat determinations of fact, when such determinations have requi the exercise of functions essentially judicial in character.

An excellent illustration of this is the case of United States Butterworth[32] in which was sustained the right of appeal to courts from decisions of the Commissioner of Patents. The co review the patent legislation of Congress and point out that pr erty rights are involved, that the determination of claims patents involves the adjudication of disputed questions of f upon scientific or legal principles, the process being essentia judicial in character, and that the court though interposed as aid to the patent office is not subject to it, its judgments be binding upon the parties, and conclusive upon the patent of itself. "The commissioner cannot question it. He is bound record and obey it. His failure to refuse to execute by app priate action would undoubtedly be corrected and supplied suitable judicial process."[33]

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[31] See Chapter LXIV.

[32] 112 U. S. 50; 5 Sup. Ct. Rep. 25; 28 L. ed. 656.

[33] In United States v. Duell (172 U. S. 576; 19 Sup. Ct. Rep. 286; 43 ed. 559), decided in 1899, this case was approved and the judicial right revision stated, if anything, more strongly, the court saying: "We perc no ground for overruling that case or dissenting from the reasoning of opinion; and as the proceeding in the court of appeals is an appeal in interference controversy presents all the features of a civil case,— a pl tiff, a defendant, and a judge,— and deals with a question judicial in nature, in respect of which the judgment of the court is final, so far as particular action of the patent office is concerned, such judgment is n

In Interstate Commerce Commission v. Brimson,[34] in which was contested the constitutionality of that section of the Interstate Commerce Act of 1887 which authorized and required the circuit courts of the United States to use their processes in aid of inquiries before the Commission, the general doctrines regarding the circumstances under which aid may be given by the courts to administrative agencies are considered at length.

§ 753. Judicial Powers of Administrative Agents.

From what has gone before it will have been seen that though the courts will not perform administrative acts, there is no constitutional objection to vesting the performance of acts essentially judicial in character in the hands of the executive or administrative agents, provided the performance of these functions is properly incidental to the execution by the department in question of functions peculiarly its own. Furthermore, as we shall later see, there is, subject to the same qualification, no objection to rendering the administrative determinations conclusive, that is, without an appeal to the courts, provided in general the requirements of due process of law as regards the right of the person affected to a hearing, to produce evidence, etc., have been met.

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the less a judgment 'because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution.'" The last clause is quoted from Interstate Commerce Commission v. Brimson, 154 U. S. 447; 14 Sup. Ct. Rep. 1125; 38 L. ed. 1047.

[34] 154 U. S. 447; 14 Sup. Ct. Rep. 1125; 38 L. ed. 1047.

CHAPTER LXIV.

CONCLUSIVENESS OF ADMINISTRATIVE DETERMINATIONS.

§ 754. Due Process of Law Does not Demand Determinatior Rights in Courts of Law.

Due process of law does not require that personal and prop rights shall in all cases be finally determined in courts of law. leading case upon this point is Murray v. Hoboken Land & provement Co.[1] in which it was held that the issuance of a tress warrant under an act of Congress by the Solicitor of Treasury of the United States against a delinquent collector not reviewable by the courts except to determine the legal aut ity of the officer to issue it. "There are," say the court, "mat involving public rights, which may be presented in such f that the judicial power is capable of acting on them, and wl are susceptible of judicial determination but which Congress or may not bring within the cognizance of the courts of the Un States, as it may seem proper. . . . It is true, also, that e in a suit between private persons to try a question of pri right, the action of the executive power upon a matter commi to its determination by the Constitution and laws, is conclusiv

The principle then is, as has been more fully shown in chapter entitled "Due Process of Law," the prohibition posed by the Constitution upon both the national and state ernments that life, liberty, or property shall not be taken wit "due process of law," means not so much that a specific m of procedure shall be followed, as that in that procedure cer fundamental principles looking to the protection of the i vidual against oppression and injustice shall be followed. accordance with this interpretation it has been held that the de mination of facts upon which a given right of life, liberty property may depend, need not necessarily be placed in the h

[1] 18 How. 272; 15 L. ed. 372.

[2] Citing Luther v. Borden, 7 How. 1; 12 L. ed. 581; Doe v. Braden, 16 635; 14 L. ed. 1090.

of the courts but may be conclusively determined by executive agents.[3] In Murray's Lessee v. Hoboken Land and Improvement Co.[4] above quoted, it was held that Congress might endow an administrative officer with the power to determine the amount due from a government officer, and to enforce its collection, without the intervention of the courts, by a distress warrant issued by the Solicitor for the Treasury. In Springer v. United States[5] a similar authority was granted the executive arm for the collection of a tax from a private citizen, the court saying: "The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of the government. The idea that every taxpayer is entitled to the delays of litigation is unreasonable. If the laws here in question involve any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see the evil was corrected. The remedy does not lie with the judicial branch of the government."

The same finality that has been essential to administrative determinations has been predicated of the decisions of tribunals established under the treaty-making power. In Comegys v. Vasse[6] the court say, referring to the treaty of 1819 between the United States and Spain: "The object of the treaty was to invest the commissions with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not re-examinable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim can not be brought again under review, in any judicial tribunal; an amount once

[3] Upon this general subject see the excellent article by Professor T. R. Powell in the *American Political Science Review* for August, 1907, entitled "Conclusiveness of Administrative Determinations in the Federal Government."

[4] 18 How. 272; 15 L. ed. 372.

[5] 102 U. S. 586; 26 L. ed. 253.

[6] 1 Pet. 193; 7 L. ed. 108.

fixed, is a final ascertainment of the damages or injury."[7]]
last of these cases with reference to the existence of a
the court say "We think that in the question whether this
has ever been terminated, governmental action in respect
must be regarded as of controlling importance."

It will be noted that in several of the foregoing case
practical requirements of efficient government furnish the
of argument. This same justification is even more emph
in later cases, and, with the continuing increase in numbe
complexity of governmental functions, we may confidently e
that the courts will strengthen the hands of the administ
whenever possible. It is not to be expected, however, th
judiciary will ever resign the right to determine whethe
facts administratively determined are such as fall withi
field of judgment granted to the administrative agents b
law, or whether, admitting the facts to be so determined,
furnish the authority for the executive acts predicated upon

An instructive case upon these points is Smelting Co. v. K
In this case it was held that a patent for lands issued b
United States was conclusive of legal title in an action o
and could not be collaterally impeached in such action
absolutely void on its face or issued without authority.
reasoning of the court is so comprehensive of the entire topi
an extended quotation is justified. The court say:

"The patent of the United States is the conveyance by
the Nation passes its title to portions of the public domain.
the transfer of that title, the law has made numerous provi
designating the persons who may acquire it and the terms
acquisition. That the provisions may be properly carried
Land Department, as part of the administrative and exe
branch of the government, has been created to supervise a

[7] See also Sheppard v. Taylor, 5 Pet. 675; 8 L. ed. 269; Frelinghu
Key, 110 U. S. 63; 3 Sup. Ct. Rep. 462; 28 L. ed. 71; Boynton v. Blai
U. S. 306; 11 Sup. Ct. Rep. 607; 35 L. ed. 183; La Abra Silver Mini
v. United States, 175 U. S. 423; 20 Sup. Ct. Rep. 168; 44 L. ed
Terlinden v. Ames, 184 U. S. 270; 22 Sup. Ct. Rep. 484; 46 L. ed. 53
[8] 104 U. S. 636; 26 L. ed. 875.

various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty, the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determined by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of a patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed, its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights upon different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuat-

ing prejudices of different jurymen, or their varying ca
to weigh evidence.[9]

"Of course, when we speak of the conclusive presu
attending a patent for lands, we assume that it was issu
case where the department had jurisdiction to act and exe
that is to say, in a case where the lands belonged to the
States, and provision had been made by law for their sa
they never were public property, or had previously been d
of, or if Congress had made no provision for their sale,
reserved them, the department would have no jurisdic
transfer them, and its attempted conveyance of them wo
inoperative and void, no matter with what seeming regula
forms of law may have been observed. The action of the
ment would, in that event, be like that of any other spe
bunal not having jurisdiction of a case which it had assu
decide. Matters of this kind, disclosing a want of juris
may be considered by a court of law. In such cases the ob
to a patent reaches beyond the action of a special tribun
goes to the existence of a subject upon which it was co
to act.

"The general doctrine declared may be stated in a d
form, thus: a patent, in a court of law, is conclusive as
matters properly determinable by the Land Department
its action is within the scope of its authority; that is, w
has jurisdiction under the law to convey the land. In th
the patent is unassailable for mere errors of judgment.
the doctrine as to the regularity and validity of its acts,
it has jurisdiction, goes so far that if in any circumstance
existing law a patent would be held valid, it will be pr
that such circumstances existed.

"On the other hand, a patent may be collaterally impea
any action, and its operation as a conveyance defeated, b
ing that the department had no jurisdiction to dispose
lands; that is, that the law did not provide for selling t

[9] Citing Moore v. Wilkeson, 13 Cal. 478; Beard v. Federy, 3 Wall
L. ed. 88.

that they had been preserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars, the judgment of the department, upon matters properly before it, is not assailed nor is the regularity of its proceedings called into question; but its authority to act at all is denied and shown never to have existed."

In a series of cases, the court has given to customs officers final and conclusive authority in the matter of appraisement and classification of imports.

In Hilton v. Merritt[10] it was held that Congress having by statute made the appraisers' judgment final and conclusive, an appeal therefrom might not be made to the judiciary, the court saying: "We are of opinion . . . that the valuation made by the customs officers was not open to question in an action at law, as long as the officers acted without fraud and within the power conferred on them by the statute. The evidence offered by the plaintiffs and ruled out by the court tended only to show carelessness or irregularity in the discharge of their duties by the customs officers, but not that they were assuming powers not conferred by the statute."

In Buttfield v. Stranahan[11] the court held conclusive the judgment of the customs officers with reference to the fact whether or not a given importation of tea was of a grade that, under law, entitled it to entrance into the country.

§ 755. Fraud Orders.

In Public Clearing House v. Coyne[12] was sustained the constitutionality of a congressional delegation of authority to the Postmaster-General to determine, without the aid of the courts, whether the mail of a given concern should be excluded from the mails because fraudulent or partaking of the nature of a lottery.

In this case the constitutionality of the laws providing for "fraud orders" was denied upon the grounds: First, that they

[10] 110 U. S. 97; 3 Sup. Ct. Rep. 548; 28 L. ed. 83.
[11] 192 U. S. 470; 24 Sup. Ct. Rep. 349; 48 L. ed. 525.
[12] 194 U. S. 497; 24 Sup. Ct. Rep. 789; 48 L. ed. 1092.

provide no judicial hearing upon the question of illegality; that they authorize the seizure of letters without discrim between those which may contain, and those which may n tain, prohibited matter; and third, that they empower th master-General to confiscate the money of the addressee has become his property by the depositing of the letter mails.

As to the first of these objections the court say: "It is t to argue that the process of law is denied whenever the tion of property is affected by the order of an executive ment. Many, if not most, of the matters presented to these ments require for their proper solution the judgment or tion of the head of the department, and in many cases, those connected with the disposition of the public lands, the of the department is accepted as final by the courts, an when involving questions of law this action is attended by a presumption of its correctness." [13] As to the second point t law authorizes the detention of all letters of the firm, m which may be purely personal and having no connectio the prohibited enterprise, the court say: "In view of t that by these sections the postmaster is denied permission t any letters not addressed to himself, there would seem to possible method of enforcing the law except by authorizin to seize and detain all such letters. . . . A ruling tha such letters as were obviously connected with the enterprise be detained would amount to practically the annulment law." As to the third objection that the Postmaster-Gen authorized by statute to confiscate the money or the represe of money, of the addressee, the court say that this is based hypothesis, that the money or other article contained in a tered letter becomes the property of the addressee as soon letter is deposited in the post-office. As to this the opinion "The action of the Postmaster-General in seizing the lette not operate as a confiscation of the money, or the determi

[13] Citing Bates & G. Co. v. Payne, 194 U. S. 106; 24 Sup. Ct. Re 48 L. ed. 894.

of the title thereto; but merely as a refusal to extend the facilities of the Post-Office Department to the final delivery of the letter. Congress might undoubtedly have authorized the postmaster at the depositing office to decline to receive the letter at all if its forbidden character were known to him, but as this would be impossible, we think the power to refuse the facilities of the department to the transmission of such letter attends it at every step, from its first deposit in the mail to its final delivery to the addressee; and as the character of the letter cannot be ascertained until it arrives at the office of delivery, the government may then act and refuse to consummate the transaction. If the letter and its contents become the property of the addressee when deposited in the mail, the subsequent seizure by the government would not impair his title or prevent an action by him for the amount of remittance. True, this might be of no practical value to him, but it is a sufficient reply to show that the title to the letter did not change by its seizure by the postmaster."

Though the judgment of the Postmaster-General, as granted him by statute, has thus been held to be final and conclusive with reference to the issuance of fraud orders, the Supreme Court held in American School of Magnetic Healing v. McAnnulty[14] that the law required that this judgment should be one founded on facts ascertained by evidence, and that it might not be simply the Postmaster-General's personal judgment as to the fraudulent character of the business whose mail is to be excluded. Thus, in this case, the Postmaster-General having issued a fraud order against a corporation which assumed to heal disease through the influence of the mind, and to give advice and treatment by letter, the court declared the order not properly issued. The court say as to the claims of the plaintiffs:

"There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of the complainants cannot be the subject of proof as of an ordinary fact. . . . We may not believe in the efficacy of the treatment to the extent claimed by the complainants,

[14] 187 U. S. 94; 23 Sup. Ct. Rep. 33; 47 L. ed. 90.

and we may have no sympathy with them in such claims, their effectiveness is but a matter of opinion in any court. That the complainants had a hearing before the Postmast eral, and that his decision was made after such hearing, affect the case."

§ 756. Chinese Exclusion Cases.

In the various Chinese exclusion cases the same princi those already laid down have been applied. Inasmuch, h as their application has involved questions of personal rather than of property, their adoption by the courts has to some oppressive, and in the Ju Toy case,[15] decided in earnest dissenting opinions were filed. In Chae Chan I United States[16] the court held valid the Act of 1888 prob Chinese laborers from entering the United States who h parted before the passage, having a certificate issued un Act of 1882 as amended by the Act of 1884 granting the mission to return. This the court did, even though it rec that the Act of 1888 was in contravention of express stipu of the Treaties of 1868 and 1880 between the United Sta China. In Fang Yue Ting v. United States the doctri again declared that the provisions of an act of Congress in the exercise of its constitutional authority must be uph the courts, even though in contravention of an earlier treaty power to exclude or expel aliens it held to be vested in the p departments of the government, and to be executed by the tive authority except so far as the judicial department ha authorized by treaty or statute to intervene, or where son vision of the Constitution has been violated. Having this the executive department, it was held, might be authori provide a system of registration and identification of C laborers, and to require them to obtain certificates of res and to provide for the deportation of those not so obtaini

[15] United States v. Ju Toy, 198 U. S. 253; 25 Sup. Ct. Rep. 644; 4 1040.

[16] 130 U. S. 581; 9 Sup. Ct. Rep. 623; 32 L. ed. 1068.

tificates within a year. The provision of the act that the executive officer acting in behalf of the United States should bring the Chinese laborer before a federal court in order that he might be heard and the facts upon which depended his right to remain in the country decided, was held valid, the duty that imposed upon the court being declared judicial in character. "When," the opinion declared, "in the form prescribed by law, the executive officer acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case — a complainant, a defendant, and a judge — *actor, reus et judex.*"

In Ekiu v. United States[17] it was held that in reaching the determination whether an alien is lawfully entitled to enter the country, it is not necessary for the administration to take testimony. The court, however, say: "An alien immigrant, prevented from landing by any such officer claiming authority to do so under an Act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful.[18] And Congress may, if it sees fit, as in the statutes in question in United States v. Jung Ah Lung, just cited, authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be intrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty

[17] 142 U. S. 65; 12 Sup. Ct. Rep. 336; 35 L. ed. 1146.

[18] Citing Chew Heong v. United States, 112 U. S. 536; 5 Sup. Ct. Rep. 255; 28 L. ed. 770; United States v. Jung Ah Lung, 124 U. S. 621; 8 Sup. Ct. Rep. 663; 31 L. ed. 591; Wan Shing v. United States, 140 U. S. 424; 11 Sup. Ct. Rep. 729; 35 L. ed. 503.

to re-examine or controvert the sufficiency of the ev
which he acted."[19]

It is not within the province of the judiciary to orde
eigners who have never been naturalized, nor acqu
domicile or residence within the United States, nor ever
mitted into the country pursuant to law, shall be permit
ter, in opposition to the constitutional and lawful measu
legislative and executive branches of the national governm
to such persons, the decisions of executive or administr
cers, acting within powers expressly conferred by Cong
due process of law."[20]

The statute does not require inspectors to take any test
all, and allows them to decide on their own inspection an
nation the question of the right of any alien immigrant
The provision relied on merely empowers inspectors to ad
oaths and to take and consider testimony, and requires o
mony so taken to be entered of record.

The decision of the inspector of immigration being
formity with the Act of 1891, there can be no doubt tha
final and conclusive against the petitioner's right to lan
United States. The words of section 8 are clear to that ef
were manifestly intended to prevent the question of an alie
grant's right to land, when once decided adversely by an i
acting within the jurisdiction conferred upon him, from b
peached or reviewed, in the courts or otherwise, save
appeal to the inspector's official supervisors, and in acc
with the provisions of the Act."

In Lem Moon Sing v. United States[21] the contention
while, generally speaking, the administrative officers mig
jurisdiction under the statute to exclude an alien who was

[19] Citing Martin v. Mott, 12 Wh. 19; 6 L. ed. 537; Philadelphia &
v. Stimpson, 14 Pet. 448; 10 L. ed. 535; Benson v. McMahon, 127 U
8 Sup. Ct. Rep. 1240; 32 L. ed. 234; Oteiza y Cortes v. Jacobus, 1
330; 10 Sup. Ct. Rep. 1031; 34 L. ed. 464.

[20] Citing Murray v. Hoboken Land & Imp. Co., 18 How. 272; 15 L.
Hilton v. Merritt, 110 U. S. 97; 3 Sup. Ct. Rep. 548; 28 L. ed. 83.

[21] 158 U. S. 538; 15 Sup. Ct. Rep. 967; 39 L. ed. 1082.

law or treaty entitled to enter, yet if they do exclude an alien who is legally entitled to enter, they exceed their jurisdiction and their illegal action presents a judicial question for the decision of which the courts may intervene. The Supreme Court, however, refused to sustain the contention, saying: "That view, if sustained, would bring into the courts every case of an alien who claimed the right to come into the United States under some law or treaty, but was prevented from doing so by the executive branch of the government. This would defeat the manifest purpose of Congress in committing to subordinate immigration officers and to the Secretary of the Treasury exclusive authority to determine whether a particular alien seeking admission into this country belongs to the class entitled by some law or treaty to come into the country, or to a class forbidden to enter the United States. Under that interpretation of the Act of 1894 the provision that the decision of the appropriate immigration or custom's officers should be final, unless reversed on appeal to the Secretary of the Treasury, would be of no practical value."

§ 757. The Ju Toy Case.

In United States v. Sing Tuck,[22] the contention was made that the question, whether or not a person seeking admission was an alien, necessarily involved the authority of the immigration officials to act at all, and that this jurisdictional question was one which the courts could not refuse to pass upon. In this case the Supreme Court avoided passing upon the point *in limine,* holding that the petitioner could not seek judicial remedy until he had exhausted (as he had not) the administrative remedies given him by statute. In United States v. Ju Toy,[23] however, the petitioner had carried his appeal to the highest administrative official authorized by statute to consider his claim, and the Supreme Court thereupon found itself obliged to pass upon the main contention, which it did, holding that the administrative decision as to the status of the petitioner, no abuse of authority being *prima facie*

[22] 194 U. S. 161; 24 Sup. Ct. Rep. 621; 48 L. ed. 917.
[23] 198 U. S. 253; 25 Sup. Ct. Rep. 644; 49 L. ed. 1040.

[illegible]
[illegible]
[illegible]
deprivation of liberty without due process of law, the [illegible]
"The petitioner, although physically within our boundaries, [illegible]
as if he had been stopped at the limit of our [illegible]
[illegible] while the right to enter was made
[illegible] for the purpose of argument we assume that the Fifth Amend-
ment applies to him and that to deny entrance to a citi[illegible]
deprive him of liberty, we nevertheless are of opinion [illegible]
regard to him due process of law does not require judicial [illegible]
That is the result of the cases which we have cited, and [illegible]
necessary result of the power of Congress to pass exclusion [illegible]

From this decision three justices dissented. Justice B[illegible] an opinion concurred in by Justice Peckham declared "ap[illegible] the doctrine of the majority that one who, unless the re[illegible] at least be prejudged, is a citizen of the United States may [illegible] guilty of no crime, be, by the action of a ministerial of[illegible] without trial by jury or other judicial examination, pun[illegible] deportation and banishment. The dissenting justices the[illegible] to review cases in which, they assert, is declared the doct[illegible] the courts will review the findings of executive officials [illegible] erence to those facts which determine their jurisdictio[illegible] cases which are cited, however, do not determine this. Th[illegible] that the courts will review the judgments of administra[illegible] cials as to whether their authority extends over a given [illegible] that is, they will review the administrative interpretatio[illegible] statute conferring authority for administrative action, [illegible] cases do not hold that, where the administrative decisio[illegible] statute made final, they will review a decision as to [illegible] a given person or piece of property falls within th[illegible] of persons or property over which it is admitted that a[illegible] of the statute extends. Thus, had there been a question [illegible] the Exclusion Act of Congress applied to aliens, the court [illegible] review the administrative decision; but granting that it di[illegible] to aliens, they would not review the judgment of the adm[illegible]

tive officials as to whether or not a given individual was an alien, and, therefore, subject to expulsion or exclusion.[24]

Of course, if the question of alienage or citizenship is dependent upon a matter of law, and not a determination purely of fact, the matter will be reviewed by the courts. Thus, for example, in Gonzales v. Williams[25] the court determined in the last instance whether or not a native of Porto Rico who was an inhabitant of that island at the time of its cession to the United States was upon her arrival at a port of this country to be treated as an alien immigrant within the meaning of the Act of Congress of 1891.

§ 758. Constitutional Requirements of Administrative Determinations.

The series of cases, culminating in that of United States v. Ju Toy, considered in the preceding paragraphs, are to be construed as determining simply that when, by statute, the conclusive determination of facts has been vested in administrative agents, a judicial review thereof may not be demanded as a constitutional right. In two respects, however, such administrative acts are, and constitutionally must be, reviewable in the courts. In the first place, as has already been pointed out, the question of the jurisdiction of the administrative agents or bodies to act is always open to judicial examination. In the second place, it is always open to the courts to determine whether, in the administrative procedure which has been followed, the essential procedural requirements of due process of law have been present. As said by the court in Yamataya v. Fisher,[26] the court "must not be understood as holding that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."

In this case it was held that due process was satisfied by an informal notice to the plaintiff that an investigation was to be had

[24] *Cf.* article by Professor Powell, cited above.

[25] 192 U. S. 1; 24 Sup. Ct. Rep. 171; 48 L. ed. 317.

[26] 189 U. S. 86; 23 Sup. Ct. Rep. 611; 47 L. ed. 721.

to determine whether she should be deported, although i alleged that, because of her lack of knowledge of the Englis guage, she did not understand the import of the question pounded to her, and that, in fact, she did not know that these tions related to the matter of her possible deportation.

Where, from the nature of the case, the determination c fact at issue, as, for example, the ascertainment of the cha of a commodity, which character may be ascertained by comp it with an established standard, it has been held that a heari not needed.[27] And in Ekiu v. United States,[27a] earlier ref to, it will be remembered that it was held that the statut held not to require inspectors to take testimony, but that might decide upon their own inspection, whether an alien i grant was entitled to enter the country; but that upon h corpus the question could be determined by the courts whethe prevented from landing had had an opportunity to asc whether his detention was lawful.

In Chin Low v. United States,[28] however, a habeas corpu ing been denied by the lower federal courts, the Supreme C upon appeal, held that the writ should have been issued for t termination of the allegation that the petitioner had bee vented by the administrative officials from obtaining the testi of certain witnesses in her behalf. In its opinion the co however, careful to say that the only question before it is w a fair opportunity to a hearing has been given the petitione not the correctness of the determination. The court do, ho go on to say that in those cases in which it is determined th action of the administrative body has been unfair, in that denied a fair hearing, it becomes the necessary duty of the to determine whether, in fact, upon the merits of the cas petitioner is entitled to enter. As to this the court say: decision of the Department is final, but that is on the presu

[27] Public Clearing House v. Coyne, 194 U. S. 497; 24 Sup. Ct. Re 48 L. ed. 1092.

[27a] 142 U. S. 651; 12 Sup. Ct. Rep. 336; 35 L. ed. 1146.

[28] 208 U. S. 8; 28 Sup. Ct. Rep. 201; 52 L. ed. 369.

tion that the decision was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation, on the one side, and the conclusiveness of the commissioner's fiat on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the courts. . . . The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship, a longer restraint would be illegal. If he fails, the order of deportation would remain in force."

§ 759. Arbitrary Administrative Discretion.

Generally speaking, it may be said that while wide discretionary power may constitutionally be granted to administrative agents, that discretion must be one which must be guided by reason, justice, and impartiality, and must be exercised in the execution of policies predetermined by legislative act, or fixed by the common law.

In Yick Wo v. Hopkins[29] the court laid down the doctrine that the legislative investment of purely personal and arbitrary power in the hands of any public official is a denial of due process of law. "The very idea," say the court, "that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."[30] Of the ordinances in question the court say: "They seem intended to confer and actually do confer, not a discretion upon consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not as to places but as to persons. . . . The power given to them [the supervisors] is not confided to their discretion in the legal sense of that term, but is granted

[29] 118 U. S. 356; 6 Sup. Ct. Rep. 1064; 30 L. ed. 220.

[30] Quoting and approving City of Baltimore v. Radecke, 49 Md. 217.

to their mere will. It is purely arbitrary, and acknow
neither guidance, nor restraint."

In fact, however, the court found in this case that the ev
showed that the ordinances in actual operation had been
clusively directed against a particular class of persons "
warrant and require the conclusion, that, whatever may hav
the intent of the ordinances as adopted, they were applied
public authorities charged with their administration, and
representing the State itself, with a mind so unequal and op
ive as to amount to a practical denial by the State of that
protection of the law which is secured to the petitioners, as
other persons, by the broad and benign provisions of the
teenth Amendment to the Constitution of the United States."
the court add, "Though the law itself be fair on its fac
impartial in appearance, yet if it is applied and administer
public authority with an evil eye and an unequal hand, so as
tically to make unjust and illegal discriminations between p
in similar circumstances, material to their rights, the den
equal justice is still within the prohibition of the Constitu

The judgment of the court was that the petitioners could
punished for a violation of the ordinances in question.

Taken by itself the language of the court, as will be seen
quotations which have been made, indicate a view that in n
may an arbitrary discretionary power be granted to a publ
cial which will compel any person "to hold his life, or the
of living, or any material right essential to the enjoyment
at the mere will of another." The force of this holding is
ever, somewhat weakened by the fact that, as has been see
court found that, whatever the terms or intent of the ordinar
question, they had actually been administered in a grossly
and unjust manner. And also, and more importantly, in th
case of Wilson v. Eureka City[31] the court expressly uphe
constitutionality of an ordinance committing the right of the
tiff with reference to the removal of a building owned by h
the unrestrained discretion of a single official. The summ

[31] 173 U. S. 32; 19 Sup. Ct. Rep. 317; 43 L. ed. 603.

cases in the State courts, given by the court in *Re* Flaherty,[31a] in which unrestrained discretion is sustained, is quoted with approval, the court declaring the discretionary power to be "based on the necessity of the regulation of rights by uniform and general laws — a necessity which is no better observed by a discretion in a board of aldermen or council of a city than in a mayor, and the cases, therefore. are authority against the contention of plaintiff in error." [32]

In this case it is certain that the Supreme Court commits itself to the doctrine that administrative officials may, in certain cases at least, be given a discretionary power to act according to their own unrestricted judgment as to what the circumstances require, and

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[31a] 105 Cal. 558.

[32] See also Davis v. Massachusetts, 167 U. S. 43; 17 Sup. Ct. Rep. 731; 42 L. ed. 71. The summary of cases given by the court in *Re* Flaherty is as follows:

"Statutes and ordinances have been sustained prohibiting awnings without the consent of the mayor and aldermen (Pedrick v. Bailey, 12 Gray, 161); forbidding orations, harangues, etc., in a park without the prior consent of the park commissioners (Commonwealth v. Abrahams, 156 Mass. 57), or upon the common or other grounds, except by the permission of the city government and committee (Commonwealth v. Davis, 140 Mass. 485); 'beating any drum or tambourine, or making any noise with any instrument for any purpose whatever, without written permission of the president of the village,' on any street or sidewalk (Vance v. Hadfield, 22 N. Y. 588); giving the right to manufacturers to ring bells and blow whistles in such manner and at such hours as the board of aldermen or selectmen may in writing designate (Sawyer v. Davis, 136 Mass. 239); prohibiting the erecting or repairing of a wooden building without the permission of the board of aldermen (Hine v. The City of New Haven, 40 Conn. 478); authorizing harbor masters to station vessels and to assign to each its place (Vanderbilt v. Adams, 7 Cow. 349); forbidding the occupancy of a place on the street for a stand without the permission of the clerk of Faneuil Hall Market (Nightingale, Petitioner, 11 Pick. 168); forbidding the keeping of swine without a permit in writing from the board of health (Quincy v. Kennard, 151 Mass. 563); forbidding the erection of any kind of a building without a permit from the commissioners of the town through their clerk (Commissioners, etc. v. Covey, 74 Md. 262); forbidding any person from remaining within the limits of the market more than twenty minutes unless permitted to do so by the superintendent or his deputy (Commonwealth v. Brooks, 109 Mass. 355)."

[illegible]

[illegible] the grant of such a [illegible] in which [illegible] [illegible] the [illegible] of [illegible] [illegible] where it is [illegible] power which has been [illegible] exercised.

[illegible] Healing v. McAnn[illegible] [illegible] of the Postmaster-General w[illegible] [illegible] the right to [illegible] [illegible] that the law did not g[illegible] [illegible] a power to issue fraud orders ex[illegible] [illegible] that is something more th[illegible] [illegible] the Postmaster-General to show th[illegible] [illegible] the orders might be issued is a fra[illegible] [illegible] power of Congress, should it see fit, to [illegible] a general power to exclude from [illegible] [illegible] which in his judgment he migh[illegible] [illegible] not involved or passed upon.

§ 790. Mandamus.

In an earlier chapter of this treatise it has been pointed o[illegible] the courts will not by mandamus or other writ attempt to [illegible] the exercise by executive or administrative agents of a disc[illegible] given them by the Constitution or statutes. This, as we [illegible] excludes from the field of judicial review all those acts [illegible] as political in character, are purely discretionary. It also ex[illegible] an attempt upon the part of the courts to control all other ad[illegible] trative and executive acts in so far as there is possessed by [illegible] officials intrusted with their performance, a discretion as to h[illegible] acts shall be performed at all. Where, however, an act, not [illegible] political in character, is by law required of an officer, th[illegible]

[illegible] 137 U. S. 94; 23 Sup. Ct. Rep. 33; 47 L. ed. 90.

formance of which involves the exercise of a discretion, the courts may require that that discretion be exercised and the act performed. Furthermore, whether or not an officer has overstepped the limits of the discretionary powers granted him is always a proper subject for judicial determination.

That a mandamus will lie to compel the performance of purely ministerial acts, that is, those not involving the exercise of political or administrative discretion, is a principle that antedates the adoption of the United States Constitution.

§ 761. Ministerial Acts: Marbury v. Madison.

The American case which is usually cited as establishing once for all this rule is Marbury v. Madison.[34] That case, however, was a contribution to the law of the subject, not as determining the principle itself, but as declaring its applicability to the heads of the great departments of the Federal Government.[35] In this case the court had been asked to issue a mandamus directing the Secretary of State to deliver a certain commission to office which had been approved by the Senate and signed by the President.

In his opinion, Marshall, after repudiating any claim on the part of the court to interfere with the President or other executive agents in the exercise of their political functions, or those discretionary in character, said: "But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts, he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others. . . . Where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself in-

[34] 1 Cr. 137; 2 L. ed. 60.

[35] Even as to this point it has been argued that the opinion is *obiter* inasmuch as the court finally declared that it was without jurisdiction to entertain the suit as an original suit, in which form it had been brought. Mandamus will not lie to compel the Secretary of the Treasury to pay an official salary. United States v. Guthrie, 17 How. 284; 15 L. ed. 102.

jured, has a right to resort to the laws of his
for a remedy. . . . The question whether a rig
vested or not, is, in its nature judicial, and must be t
the judicial authority." The chief justice then goes on
sider whether the head of one of the great departments of
ment is so intimately connected with the President as t
him outside of the reach of the court's order, and says: "I
the heads of departments commits any illegal act, under
office, by which an individual sustains an injury, it cannot
tended that his office alone exempts him from being sued
ordinary mode of proceeding, and being compelled to o
judgment of the law. How, then, can his office exempt hi
this particular mode [mandamus] of deciding on the leg
his conduct, if the case be such a case as would, were an
individual the party complained of, authorize the process
not by the office of the person to whom the writ is directed,
nature of the thing to be done, that the propriety or improp
issuing a mandamus is to be determined. Where the he
department acts in a case, in which executive discretion
exercised, in which he is the mere organ of executive w
again repeated that any application to a court to control, in
spect, his conduct would be rejected without hesitation. Bu
he is directed by law to do a certain act affecting the absolu
of individuals, in the performance of which he is not place
the particular direction of the President, and the perform
which the President cannot lawfully forbid, and therefore
presumed to have forbidden, as for example to record a
sion or a patent for land, which has received all the lega
nities; or to give a copy of such record; in such cases it is
ceived on what grounds the courts of the country are
excused from giving judgment that right be done to an
individual, than if the same services were to be perform
person not the head of a department."

§ 762. Mandamus May not be Used in Place of an Appe

The courts will not interfere by mandamus with execu
cers of the government in the exercise of their ordinary

duties, even where those duties require an interpretation of the law. The writ of mandamus, in other words, is not to be used as a writ of error in place of an appeal. If there has been a misinterpretation of the law by the executive officer, the court, if it has been given jurisdiction, will correct it on appeal, or the person who believes himself injured may institute appropriate civil or criminal proceedings.[36]

In Bates & Guild Co. v. Payne[37] the authorities are reviewed, and a doctrine stated that is not quite as broad as that declared in Oil Co. v. Hitchcock, the court pointing out that "even upon mixed question of law and fact, or of law alone," the action of the official "will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they have the power, and will occasionally exercise the right of so doing."

In Marquez v. Frisbie[38] the court declare that "it is a sound principle that where there is a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law had confided the matter is conclusive."

When a subordinate administrative officer is overruled by his superior who has an appellate administrative jurisdiction over him, his duty to obey is a ministerial one and may be compelled by mandamus.[39] The federal court must, however, have been granted, by statute, the authority to issue the mandamus and,[40] in fact, no such general authority has been granted by Congress to the federal courts. It has, however, been held, that the courts of the District of Columbia, having been granted general common-law powers, possess the authority.[41]

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[36] Riverside Oil Co. v. Hitchcock, 190 U. S. 316; 23 Sup. Ct. Rep. 698; 47 L. ed. 1074.

[37] 194 U. S. 106; 24 Sup. Ct. Rep. 595; 48 L. ed. 894.

[38] 101 U. S. 473; 25 L. ed. 800.

[39] United States v. Miller, 128 U. S. 40; 9 Sup. Ct. Rep. 12; 32 L. ed. 354.

[40] United States v. Black, 128 U. S. 40; 9 Sup. Ct. Rep. 12; 32 L. ed. 354; United States v. Windom, 137 U. S. 636; 11 Sup. Ct. Rep. 197; 34 L. ed. 811.

[41] Kendall v. United States, 12 Pet. 524; 9 L. ed. 1181; United States v. Schurz, 102 U. S. 378; 26 L. ed. 167.

§ 763. The Amenability of the President to Compulsory J Process.

From the foregoing it has appeared that, for the perform a purely ministerial act, a mandamus will lie to the heads great departments of the Federal Government, and, *a fort* their subordinates. We have now to inquire whether the dent, the chief executive of the nation, is, with reference to t formance of a purely ministerial act, similarly subject to c sory judicial process. This question has several times been the courts, and though not often passed upon *in limine,* ha uniformly answered in the negative.

In Marbury v. Madison[42] the question was as to the issua a mandamus not to the President but to the Secretary of Sta was argued, however, that the Secretary acted as the agent President, and that the President, as Chief Executive, w amenable to the writ. The court, in its opinion, held that th retary was, as to the action prayed for, subject to the wri conceded that in cases in which the Secretary was but carryi the political or discretionary will of the President, the writ not issue. In this case it will be remembered that the court f refused to issue the injunction to the Secretary on the groun the provision of the act of Congress giving the original jurisd under which the suit had been brought was unconstitut President Jefferson, however, declared that had the mand been awarded, he would have considered it an infringement his executive rights and as such would have resisted its en ment with all the power of government.

In Marbury v. Madison the court did not intimate what its tion would be in case the performance directly by the Presid merely ministerial duties was prayed.

In the trial of Aaron Burr for treason the amenability President to a judicial process was brought directly into Marshall, who was conducting the examination, issued, at t quest of the defense, a *subpœna duces tecum* directing Pre Jefferson to appear and bring with him a certain letter to hi

[42] 1 Cr. 137; 2 L. ed. 60.

from General Wilkinson. Jefferson refused to appear or to bring the letter. That a compulsory process should be thereupon issued to the President does not appear to have been even considered, but upon a discussion as to whether the Attorney-General should permit the defense to have the examination of a copy of the letter which had been put into his, the Attorney-General's, possession, Marshall said: "I suppose it will not be alleged in this case that the President ought to be considered as having offered a contempt to the court in consequence of his not having attended; notwithstanding the subpœna was awarded agreeably to the demand of the defendant, the court would, indeed, not be asked to proceed as in the case of an ordinary individual." [43]

In another account of the same trial the Chief Justice is reported to have said: "In no case of this kind would the court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and obvious that all must acknowledge them. . . . In this case, however, the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of reasons for and against producing it he himself is the judge." [44]

§ 764. Mississippi v. Johnson.

In Mississippi v. Johnson,[45] decided in 1866, a perpetual injunction was sought to restrain the President from executing the Reconstruction Acts, which were alleged to be unconstitutional. The petition set out that legal secession of a State was impossible, and hence "it was impossible for her people, or for the State in its corporate capacity, to dissolve that connection with other States, and that any attempt to do so by secession or otherwise was a nullity," and that Mississippi "now solemnly asserted that her connection with the Federal Government was not in anywise

[43] *Burr's Trial*, III, 37. Published by Westcott & Co., Washington City, 1807.

[44] *Burr's Trial*, II, 536. Hopkins & Earle, Philadelphia, 1808.

[45] 4 Wall. 475; 18 L. ed. 437.

[illegible] and asserted "that the C[illegible] [illegible] constitutionally expel her from the U[illegible] [illegible] practically [illegible] is a nullity." [illegible] "The acts in question [illegible] [illegible] government, by assuming for Congress [illegible] [illegible] government—in [illegible] power over it—and the utter destructi[illegible] [illegible] consequence of their execution. They [illegible] a well-known salutary principle in governments, th[illegible] [illegible] of which alone can preserve them, by making the ci[illegible] subordinate to the military power, and thus establish a [illegible] over the States enumerated in the act, and make a p[illegible] by which the government of the United States may be c[illegible] into a military despotism, in which every man may be [illegible] of goods, lands, liberty, and life by the breath of a milit[illegible] [illegible] or the sentence of the military commission or t[illegible] without the benefit of trial by jury, and without the ob[illegible] of any of those requirements and guarantees by which t[illegible] [illegible] and laws so plainly protect and guard the right[illegible] [illegible]."

President Johnson had vetoed these acts on the ground [illegible] unconstitutionality. It was charged by the bill that neve[illegible] he was about to execute these acts. In so doing he would [illegible] be performing a purely ministerial act, since, it being [illegible] that he personally denied their constitutionality, it follow[illegible] in executing them he was simply obeying, without oppo[illegible] for discretion, the commands of Congress.

In support of the bill it was argued that the judicial p[illegible] extended by the Constitution to *all* cases in law and equity [illegible] under the Constitution, that the President was a creation [illegible] Constitution, and an agent for its enforcement.

In opposition to the bill it was argued that this was [illegible] against the President officially. "There is," it was asserte[illegible] allegation that the President is about to do anything of h[illegible] motion which as President he is not authorized to do. Th[illegible]

gation is that he is about to execute certain laws passed by Congress."

"It is not upon any peculiar immunity," said counsel, "that the individual has, who happens to be President, upon any idea that he cannot do wrong; upon any idea that there is any particular sanctity belonging to him as an individual, as in the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United States is above the process of any court, or the jurisdiction of any court, to bring him to account as President. There is only one court, or *quasi*-court that he can be called upon to answer to for any dereliction of duty, for doing anything that is contrary to law or failing to do anything which is according to law, and that is not this tribunal, but one that sits in another chamber of this Capitol. There he can be called and tried and punished, but not here while he is President, and after he has been dealt with in that chamber and stripped of the robes of office, and he no longer stands as the representative of the government, then, for any wrong he has done to any individual, for murder or any crime of any sort which he has committed as President, then and not till then can he be subjected to the jurisdiction of the courts. Then it is the individual they deal with, not the representative of the people."

The court, in a very brief opinion, refused to issue the writ, saying:

"The single point which requires consideration is this: can the President be restrained by injunction from carrying into effect an Act of Congress alleged to be unconstitutional?

"It is assumed by the counsel for the State of Mississippi, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms 'ministerial' and 'executive,' which are by no means equivalent in import."

After pointing out that the duties sought to be enjoined were executive and political, the court declare that "an attempt on the part of the Judicial Department of the Government to enforce the performance of such duties by the President might be justly

a case in which a peremptory mandamus was prayed and awarded to the Postmaster-General commanding him to credit the petitioners with certain amounts which had been found due them from the United States by a decision of the Solicitor of the Treasury.

The court said: "The executive power is vested in a President and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode presented by the Constitution through the impeaching power. But it by no means follows that every officer in every branch of that department is under the exclusive direction of the President. There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper which is not repugnant to any rights secured and protected by the Constitution, and in such case, the duty and responsibility grow out of and are subject to the control of law, and not to the direction of the President. And this is emphatically the case where the duty enjoined is of a mere ministerial character. . . . It was urged at the bar that the Postmaster-General was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed as growing out of the obligation imposed upon him by the Constitution to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power which has no countenance for its support in any part of the Constitution, and is asserting a principle which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice." [49]

[49] The same reason which has supported the immunity of the President from compulsory judicial process has, in several of the States of the Union, supported a similar immunity on the part of the Governor. The scope of this treatise will not permit, however, a discussion of this phase of the question. For a discussion of this subject see the *University Law Review*, III, 335; *Mich. Law Review*, III, 631; *Columbia Law Review*, VI, 453.

is independent of both." Jackson was no lover of the Supreme Court, and in this instance certainly stated the case strongly, but in his action he was undoubtedly correct.[50] Whether he acted wisely, or even with proper respect toward the other branches of the government is another question.

Whether the President has the right to refuse to execute a law, passed during the term of a predecessor, or over his veto, because he deems it unconstitutional, is an entirely different question from that just considered. Here the President has to deal not with a measure in the process of enactment, as is the case when the veto is exercised, but with a bill that has passed through all this constitutional forms of enactment, and has become a law, and it would seem that he has no option but to enforce the measure. The President has not been given the power to defeat the will of the people or of the legislature as embodied in law. The reasons for maintaining a contrary opinion, as usually stated, are these: The Constitution of the United States is the supreme law of the President as well as of the private citizen. It is his duty to "take care that the laws be faithfully executed," but he is also sworn to "preserve, protect and defend the Constitution," and this he must do upon his own interpretation of the Constitution, and not upon that of others. The Constitution is but a law of high degree, and is, therefore, one of the very laws that he must take care are faithfully executed. Says one writer:[51] "If the President must execute all laws, he must execute an *ex post facto* law or any other law flying in the teeth of the constitution; a partisan statute passed over his veto can rob him of the right to be commander-in-chief, to nominate or remove from office, or of any other right expressly conferred upon him; and it is at once evident that in these cases Congress would be quite as plainly taking away from the President the power which the constitution has expressly given. A two-thirds majority could alter at will many important provisions of the constitution, and the members could only be called to account at a re-election. That instrument in these cases would

[50] Van Holst holds a contrary view. *Constitutional History*, I, 46.
[51] *American Law Review*, XXIII, 375.

[illegible] that, in the first [illegible] it in all its [illegible] all people, and in the second place, that impeach

is not a check. As an instrument for checking unconstitutional action on the part of the President, impeachment has been found too cumbersome. If, in the case of the extreme opposition and contest between both Houses of Congress and President Johnson, an impeachment was not successful, it must be admitted that as a means of future restraint upon the Chief Executive it will not be greatly feared.

That the President and all other officers of the government have not the right to refuse obedience to a judgment of the Supreme Court, because he or they believe such judgment to be based upon an incorrect interpretation of the Constitution, scarcely needs argument. This case is stronger than the former one by the additional support of the judiciary. To refuse now to execute the command of the court is to assume the judicial power of a court of appeals as well as legislative functions.

§ 768. Liability of the State for the Acts of Its Officers.

The doctrine of the non-suability of the State prevents the prosecution of a claim against the United States, whether that claim be founded upon a tort of one of its agents, or is one arising out of a contract.

"No government," says the Supreme Court in Gibbons v. United States[52] "has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents. It does not undertake to guarantee to any person the fidelty of the officers whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses which would be subversive of the public interests; . . . The general principle which we have already stated as applicable to all governments, forbids, as a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizens though occurring while engaged in the discharge of official duties." [53]

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[52] 8 Wall. 269; 19 L. ed. 453.

[53] See also Dooley v. United States, 182 U. S. 222; 21 Sup. Ct. Rep. 762; 45 L. ed. 1074, and authorities there cited.

§ 769. Legal Liability of Public Officials to Private Individuals Injured by Their Acts; Ultra Vires Acts.

As has elsewhere been shown in this treatise, a fundamental principle of American law is that the legality of acts of public officers is determined in the ordinary courts according to the same rules that govern the decision of suits between private individuals. Thus, generally speaking, no officer can defend an *ultra vires* or otherwise illegal act by setting up his official position or exhibiting the command of a political superior. This last statement as to the non-applicability of the principle of *respondeat superior* is, however, subject to this qualification, that the order of an administrative superior, *prima facie* legal, though in fact not legal, may be set up in defense of an act commanded by military superiors. In *Re* Fair,[54] decided in 1900, the court say: "The law is that an order given by an officer to his private, which does not expressly or clearly show on its face its illegality, the soldier is bound to obey; and such order is his full protection. The first duty of an officer is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as he may consider them valid or invalid, the precious moment for action would be wasted. Its law is that of obedience. No question can be left open of the right to command in the officer, or of the duty of obedience in the soldier. While I do not say that the order given . . . to the petitioners was in all particulars a lawful order, I do say that the illegality of the order, if illegal it was, was not so much so as to be apparent and palpable to the commonest understanding. If, then, the petitioners acted under such order in good faith, they are not liable to prosecution." [55]

The result of the doctrine thus stated is, as will be seen, that an act is defended for the performance of which in fact no legal authority can be produced. Simply the color of authority on the

[54] 100 Fed. Rep. 149.

[55] *Cf.* Wyman, *American Administrative Law*, § 2.

part of the superior giving the command is held a sufficient defense. Clearly common justice, and the practical necessities of administration justify the rule, yet, inasmuch as it does in fact protect an act essentially illegal, the doctrine is one that is kept within the narrowest possible bounds. Only where there is present no fact which would put the subordinate, as a man of ordinary intelligence, upon his guard, or where the practical necessities of the case leave little or no opportunity for individual judgment in the matter, should the rule be applied. In all other cases, it is to be repeated, the public official is able to defend his act only by showing some existing legal authority for it.

The necessities of the case require the foregoing doctrine, with reference to the military arm of government. There not being the same urgency for immediate obedience, the doctrine does not prevail in civil matters. Thus, in Hendricks v. Gonzales[56] the order of the Secretary of the Treasury to the Collector of the Port of New York was held not to exonerate him from liability for an act done under it, the court saying: "The questions presented by the assignments of error seem free from doubt. The plaintiff having complied with the condition entitling him to clearance, it was the duty of the defendant as collector of the port, to grant a clearance for the vessel and her cargo, unless he was justified in refusing to do so by some other statutory authority. Neither the Secretary of the Treasury nor the President could nullify the statute, and though the defendant may have thought himself bound to obey the instructions of the former, his mistaken sense of duty could not justify his refusal of the clearance, and these instructions afforded him no protection unless they were authorized in law."

§ 770. Mandamus to Compel Performance of Commands of Administrative Superior.

As earlier pointed out, where the performance of a ministerial duty is commanded by an administrative superior, mandamus will

[56] 67 Fed. Rep. 351.

is that of Spalding v. Vilas.[61] In this case Spalding had charged that the Postmaster-General had, by the issuance of a circular, maliciously injured his business. The court, after holding that the issuance of the circular had not been beyond the general scope of the official authority of the Postmaster-General, declare that he cannot be subject to suit because his act had been dictated by malice. The court admit that the precise point had not been previously determined in the United States, but that a line of cases, English as well as American, support the doctrine that the higher judicial officers are exempt from responsibility for a malicious exercise of their authority. After an extended review of these cases, the court say:

"We are of the opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts. As in the case of a judicial officer, we recognize a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision. Whatever difficulty may arise in applying these principles to particular cases, in which the rights of the citizen may have been materially impaired by the inconsiderate or wrongful action of the head of a department, it is clear — and the present case requires nothing more to be determined — that he cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority, by reason of

[61] 161 U. S. 483; 16 Sup. Ct. Rep. 631; 40 L. ed. 780.

any personal motive that might be alleged to have promp
action, for personal motives cannot be imputed to duly aut
official conduct. In exercising the functions of his office, t
of an executive department, keeping within the limits
authority, should not be under an apprehension that the
that control his official conduct may at any time become t
ject of inquiry in a civil suit for damages. It would se
cripple the proper and effective administration of public
as intrusted to the executive branch of the government,
were subjected to any such restraint. He may have legal au
to act, but he may have such large discretion in the premis
it will not always be his absolute duty to exercise the au
with which he is invested. But if he acts, having authori
conduct cannot be made the foundation of a suit against hi
sonally for damages, even if the circumstances show that
not disagreeably impressed by the fact that his action inju
affects the claims of particular individuals. In the presen
as we have found, the defendant, in issuing the circular in
tion, did not exceed his authority, nor pass the line of hi
as Postmaster-General. The motive that impelled him to d
of which the plaintiff complains is therefore wholly imma
If we were to hold that the demurrer admitted, for the p
of the trial, that the defendant acted maliciously, that cou
change the law."

A fortiori it follows from the doctrine declared in Spald
Vilas that a public officer acting from a sense of duty in a
where he is required to exercise discretion, is not liable
action because of any error of judgment or mistake of fac
he may have made.[62]

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[62] In Kendall v. Stokes (3 How. 87; 11 L. ed. 506) the court say:

"It repeatedly and unavoidably happens, in transactions with the
ment, that money due to an individual is withheld from him for a tin
payment suspended in order to afford an opportunity for more th
examination. Sometimes erroneous constructions of the law may lea
final rejection of a claim in cases where it ought to be allowed. But a
officer is not liable to an action if he falls into error in a case where
to be done is not merely a ministerial one, but is one in relation to

§ 772. Responsibility of Judges of Courts of Superior or General Jurisdiction.

That judges of courts of superior or general jurisdiction are not liable to civil suits for judicial acts, even though maliciously or corruptly done, has already been indicated, the cases in point being reviewed by the court in Spalding v. Vilas. This is true even when the acts done are in excess of their jurisdiction, provided it appear that this want of jurisdiction is not clear and unmistakable. Where, however, authority is clearly usurped, action will lie. The doctrine as to this is sufficiently shown in the following words from the opinion in Bradley v. Fisher:[68]

"Where there is clearly no jurisdiction over the subject-matter any authority exercised is an usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, and proceed to the arrest and

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it is his duty to exercise judgment and discretion: even although an individual may suffer by his mistake. A contrary principle would, indeed, be pregnant with the greatest mischiefs. It is unnecessary, we think, to refer to the many cases by which this doctrine has been established. It was fully recognized in the case of Gidley, Exec. of Holland, v. Ld. Palmerston, J. B. Moore, 91; 3 B. & B. 275."

[68] 13 Wall. 335; 20 L. ed. 646.

CHAPTER LXV.

THE DELEGATION OF LEGISLATIVE POWER.

§ 773. Delegated Power May not be Delegated.

"One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain, and by that constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." [1]

The principle as thus absolutely stated is subject to one important exception, and to several qualifications, or at least explanations.

§ 774. Local Governing Powers May be Delegated.

The exception is with reference to the delegation of powers to local governments. The courts have held, as to this, that the giving by the central legislative body of extensive law-making powers with reference to local matters to subordinate governing bodies being an Anglo-Saxon practice, antedating the adoption of the Constitution, and the right of local self-government being so fundamental to our system of politics, our Constitutions are, in the absence of any express prohibitions to the contrary, to be construed as permitting it.[2]

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[1] Cooley, *Constitutional Limitations*, 7th ed., 163.

[2] "It seems to be generally conceded," the court say in State v. Noyes (30 N. H. 279), "that powers of local legislation may be granted to cities, towns, and other municipal corporations and it would require strong reasons to satisfy us that it could have been the design of the framers of our Constitution to take from the legislature the power which has been exercised in

The court cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."[4]

§ 776. Field v. Clark.

The doctrine thus declared is without objection so long as the facts which are to determine the executive acts are such as may be precisely stated by the legislature and certainly ascertained by the executive. When this is not so, the officer intrusted with the execution of the law is necessarily vested with an independent judgment as to when and how the law shall be executed; and when this independence of judgment is considerable there is ground for holding that the law is not simply one *in presenti* to take effect *in futuro,* but is a delegation by the law-making body of its legislative discretion. This was one of the points especially urged in the leading case of Field v. Clark.[5] By the third section of the Tariff Act of October 1, 1890, it was provided that, with a view to securing reciprocal trade, "whenever and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States, he may deem to be reciprocally unequal and unreasonable, he shall have the power, and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea and hides, the production of such country, for such time as he shall deem just."

[4] Quoted and approved in Field v. Clark, 143 U. S. 649; 12 Sup. Ct. Rep. 495; 36 L. ed. 294.

[5] 143 U. S. 649; 12 Sup. Ct. Rep. 495; 36 L. ed. 294.

§ 777. Other Illustrative Cases.

The question when an administrative discretion is so broad as to amount to a legislative power is one that may not be answered according to any fixed formula, but one that has to be answered in each individual case according to the judgment of the court. During recent years, with the increase of governmental functions, both in number and complexity, and especially with the extension of the law's control over matters of industrial and technical interest, the delegation to administrative agents and in particular to boards or commissions, of wide spheres of discretionary action, has become a necessity. This in turn has given rise to a very great number of cases in both the federal and state courts in which it has been alleged that legislative power has been unconstitutionally delegated. In this treatise it will be clearly impossible to consider more than a few of the more recent and more important cases in which the question has been considered by the Supreme Court of the United tSates. These will, however, be sufficient to illustrate and exhibit the general principle.

In Buttfield v. Stranahan,[6] decided in 1904, the court held valid the grant by Congress to the Secretary of the Treasury of authority to establish standards, upon recommendation of a board of experts, by which should be determined the purity, quality, and fitness for consumption of teas sought to be imported into the United States, and to exclude from importation such teas as should not satisfy these requirements as provided by law. "We are of opinion," say the court, "that the statute, when properly construed . . . but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute." "Whether or not," the court add, "the Secretary of the Treasury failed to carry into effect the expressed purpose of Con-

[6] 192 U. S. 470; 24 Sup. Ct. Rep. 349; 48 L. ed. 525.

[illegible] which operated to exclude [illegible] [illegible] proper standards [illegible] upon to consider. The [illegible] of the Secretary of the Treasury [illegible] exercised [illegible] of bad faith [illegible] the standards [illegible] the performance of the duties [illegible]

In [illegible] Bridge [illegible] United States[7] decided in 1907, [illegible] legislative power [illegible] the court in this case sustaining [illegible] the Secretary of War [illegible] alterations in bridges [illegible] of the United States when, after a hearing [illegible] satisfied that the structure [illegible] will constitute an unreasonable [illegible] After a review of the cases [illegible] in entire harmony with the [illegible] In [illegible] Congress the authority [illegible] the executive branch of the government the exercise [illegible] power which, from the nature of the case, Congress could not itself exercise, would be, the [illegible] stop the wheels of government, and bring about [illegible] if not paralysis, in the conduct of the public business."[8]

In St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor[9] it was held that legislative power had not been granted to the American Railway Association and the Interstate Commerce Commission by the Safety Appliance Act of 1893, which forbids the use

[7] 204 U. S. 364; 27 Sup. Ct. Rep. 367; 51 L. ed. 523.

[8] The requirement that alterations shall be made is not, the court go on to hold, a taking of private property for a public use, for which compensation must be made, but is a proper measure incidental to the regulation of commerce among the States.

[9] 210 U. S. 281; 28 Sup. Ct. Rep. 616; 52 L. ed. 1061.

of only such cars as have drawbars of uniform height, and empowers the Association to fix and the Commission to declare, the standard.

§ 778. Delegation of Rate-Making Powers.

That the fixing of the rates or charges that may be collected by public service corporations for the services rendered by them is, primarily at least, a legislative function, is so well established that the citation of authorities is scarcely necessary.[10] Indeed, it was originally held in Munn v. Illinois[11] that this power was so exclusively legislative that the validity of the laws in regulation of business affected with a public interest could not be questioned by the courts under the due process of law clauses of the Constitution.[12]

In the States the delegation by the legislative body, to commissions or other boards, of authority to fix rates has been generally sustained where by law general principles have been established for the guidance and control of these administrative bodies in the exercise, in specific instances, of their rate-making powers.

In a number of instances these laws have come before the Supreme Court of the United States, but not in such a way as to compel that court to pronounce squarely upon their constitutionality as tested by the principle that legislative power may not be delegated by the law-making body to an administrative board or commission. And, indeed, this is a question of state constitutional law with which the federal courts have no concern. It is only when the allegation is made that the rates as fixed, whether directly by the legislature or by another authority, are confiscatory, and, therefore, operate to deprive either the railway or the

[10] In Atlantic C. L. R. Co. v. North Carolina Corp. Com. (206 U. S. 1; 27 Sup. Ct. Rep. 585; 51 L. ed. 933) a long list of cases as to this are cited in a footnote. See also the valuable monograph of Mr. R. P. Reeder entitled "Rate Regulation as Affected by the Distribution of Governmental Powers in the Constitutions."

[11] 94 U. S. 113; 24 L. ed. 77.

[12] See Chapter XLVI.

shipper of property without due process of law, that a federal que tion is raised.

It is true, however, that the Supreme Court in a number (instances has intimated that the rate-making power may be del gated, but these cannot be said to be precedents, or indeed to ind cate with any decisiveness what the position of that tribunal wi be when the point is brought squarely before it.

That a considerable amount of regulative control over railwa may constitutionally be delegated to the Interstate Commer Commission has not been disputed. It was not until the act (1906, however, that that body was intrusted by Congress with tl authority to fix in specific instances the rates that interstate rai ways might charge. By that law it is provided that the rat which these companies may legally fix, or which may be fixed fc them by the Commission, must be "just and reasonable." Thi is, practically, the only principle legislatively laid down for th guidance and control of the Commission. The question, therefor which still awaits final judicial settlement by the Supreme Cou is whether this provision of the law may fairly be said to la down a sufficiently definite rule which the Commission is merel to apply to specific cases as they arise, to warrant the determin tion that that body has not been endowed with a discretionar power of fixing rates which is in fact legislative. The opinio may, however, be hazarded that, arguing from Field v. Clarl Buttfield v. Stranahan, and Union Bridge Co. v. United State the act of 1906 will be sustained.[12a]

§ 779. The Referendum as a Delegation of Legislative Power.

As to whether the so-called "referendum" employed in som of the States is an unconstitutional delegation by the legislatur of law-making powers to the people, there is a conflict of author ties. The weight of authority would, however, seem to be th

[12a] Indeed, in Interst. Com. Com. v. Chicago, R. I. & Pac. Ry., and Inters Com. Com. v. C., B. & Q. R. R., decided May 31, 1910, the rate-making powe of the Commission seem to be accepted without constitutional question.

the submission to the electorate of the entire State as to whether a measure shall or shall not become a law is void.[13]

§ 780. Administrative Ordinances.

The authority that administrative agents may constitutionally exercise in the promulgation of rules and ordinances regulating in detail the execution of the laws the enforcement of which has been placed in their hands, and the legal force to be given to these rules thus administratively established, has given rise to many adjudications. These rules, it is to be observed, fall into two general classes. First, those established by an administrative superior and directed solely to the administrative inferior; secondly, those binding of course the administrative inferiors, but primarily directed to the private citizen, and fixing the manner in which the requirements of the statute are to be met by him. This second class of rules is, in turn, divisible into two classes; those to which a criminal penalty is attached for their violation, and those merely defining the manner in which rights created by the statute are to be enjoyed.

The first of these two main classes of administrative ordinances differ from those of the second class in that though valid as between the administrative superior and his inferior, they do not create legal rights which the private citizen may enforce in the courts. Of this class, for example, are certain of the civil service regulations which the Presidents of the United States have issued under authority of the Civil Service Acts, fixing the classes to be included in the "classified service," providing for examinations for admission to the service, and declaring the conditions under which promotions and removals may be made.

As to those rules or ordinances, established by executive agents, providing the modes under which private persons may receive the privileges granted by law or be held responsible for violations of the duties imposed therein, it may in general be said that the executive may establish all special regulations that fall within

[13] *In re* Municipal Suffrage, 160 Mass. 566; Santo v. Iowa, 2 Iowa, 165. *Cf.* Oberholtzer, *The Referendum in America;* Cooley, *Const. Lim.*, 7th ed., 168.

the general field of the authority granted by law, and which ar reasonably calculated to secure the execution of the legislativ will as laid down in the statutes.

With reference to many of the Army and Navy Regulatior issued by the President it is to be observed that these derive thei force not from congressional authorization, but directly from th constitutional power of President as Commander-in-Chief of th army and navy; and this, too, notwithstanding the constitution: provision that Congress may make rules for the government an regulation of the land and naval forces. In the early case c United States v. Eliason[14] the court say: "The power of th executive to establish rules and regulations for the governmer of the army, is undoubted. . . . Such regulations cannot b questioned or denied because they may be thought unwise c mistaken."

An administrative officer in the execution of his duties may nc change the express provisions of the law, even though these pr visions no longer seem the best adapted to secure the end desire by Congress. Thus in Merritt v. Welsh[15] a customs officer wa not permitted to substitute a different test from that fixed b Congress for the determination of the quality of imported sugars "If experience shows," the opinion declares, "that Congress acte under a mistaken impression, that does not authorize the Treasur Department or the courts to take the part of legislative guardian and, by construction, to make new laws which they imagine Con gress would have made had it been properly informed, but whic Congress itself, on being properly informed has not, as yet, seer fit to make."

Thus again, in Morrill v. Jones[16] the court say: "The Secre tary of the Treasury cannot, by his regulations, alter or amenc a revenue law. All he can do is to regulate the mode of proceed ing to carry into effect what Congress has enacted. In the presen case, we are entirely satisfied the regulation acted upon by th

[14] 16 Pet. 291; 10 L. ed. 968.
[15] 104 U. S. 694; 26 L. ed. 896.
[16] 106 U. S. 466; 1 Sup. Ct. Rep. 423; 27 L. ed. 267.

collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit, duty free, all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

§ 781. Penal Ordinances.

The courts scrutinize with especial care those cases in which a criminal action is based upon the violation of an administrative order. It is not questioned that the legislature may attach a criminal liability to the violation of an administrative order, but in each case it must clearly appear that the order is one which falls within the scope of the authority conferred. Thus, while there are many cases in which it has been held that the delegation of an ordinance-making power to the executive is not a delegation of legislative power, there are comparatively few cases in which has been sustained the right of an administrative officer to establish an ordinance the violation of which will be punished criminally. In United States v. Maid[17] the court say:

"A department regulation may have the force of law in a civil suit to determine property rights, . . . and yet be ineffectual as the basis of a criminal prosecution. . . . The obvious ground of distinction is that to make an act a criminal offense is essentially an exercise of legislative power, which cannot be delegated, while the prescribing by the President or head of a department, thereunto duly authorized, of a rule, without penal sanctions, to carry into effect what Congress has enacted, although such rule

[17] 116 Fed. Rep. 650.

[illegible]

[illegible] Congress intended to make it an offense for wholesal[illegible]

[illegible] 6.7 [illegible] Rep. 764 [illegible] L. ed. [illegible]
[illegible] Am. and Eng. Enc. Law 642; 4 Bl. Com. 5.

dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in sec. 41 of the Act of October 1, 1890.

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

In United States v. Bailey[20] the following facts were involved: The Secretary of the Treasury, in order to carry into effect the authority given him by act of Congress to liquidate and pay certain claims, had, though not expressly empowered so to do by the act, authorized, by a regulation, affidavits to be made before any justice of the peace of a State. An indictment for false swearing in one of these affidavits having been brought, the question was raised as to the Secretary's power to make the regulation. The court held that he had the authority, saying: "It is a general principle of law, in the construction of all powers of this sort, that where the end is required, the appropriate means are given. Thus in this case, though express statutory authority was not given, the Secretary was held competent not only to make the regulation in question, but to make that regulation effective to sustain a prosecution for perjury under an act of Congress (Mch. 1, 1823), which provided that 'if any person shall swear or affirm falsely touching the expenditure of money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for wilful and corrupt perjury.'"

[20] 9 Pet. 238; 9 L. ed. 113.

The position here taken is not in conflict with that assumed by the court in United States v. Eaton. In both cases the question was whether, from the circumstances of the case, Congress might properly be considered to have granted, impliedly, the ordinance-making power that was exercised. It is to be conceded, however, that in the Eaton case the powers of the commissioner were very liberally construed.[21]

In *Ex parte Ellis*[22] there was involved the same statute as in the case of Eaton. Here, under the general terms of the act, the commissioner was authorized to prescribe rules regulating the form and marking of packages of oleomargarine, the violations of which rules should constitute a criminal offense. This was held to be not a delegation of legislative power, and an indictment based upon the rules issued was sustained. The court say: "The Act before us is in its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue. And, considered as a revenue act, the designation by the stamps, marks, and brands is merely in the discharge of an administrative function and falls within the numerous instances of regulations needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer.[23]

In the recent case of Oceanic Steam Navigation Co. v. Stranahan[24] the court upheld the validity of a statutory provision authorizing the Secretary of Commerce and Labor to levy and collect a money penalty from the steamship companies for bringing into

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[21] Upon this topic see the article "To What Extent Have Rules and Regulations of the Federal Departments the Force of Law," by Morris M. Cohn, in the *American Law Review*, XLI, 343.

[22] 165 U. S. 526; 17 Sup. Ct. Rep. 444; 41 L. ed. 813.

[23] Citing United States v. Symonds, 120 U. S. 46; 7 Sup. Ct. Rep. 411; 30 L. ed. 557; *Ex parte* Reed, 100 U. S. 13; 25 L. ed. 538; Smith v. Whitney, 116 U. S. 167; 6 Sup. Ct. Rep. 570; 29 L. ed. 601; Wayman v. Southard, 10 Wh. 1; 6 L. ed. 253.

[24] 214 U. S. 320; 29 Sup. Ct. Rep. 671; 53 L. ed. 1013.

the United States aliens affected with loathsome or dangerous contagious diseases. This the court did, however, upon the theory, based, it must be admitted, upon a very liberal interpretation, that the fines authorized to be collected were not penal in character, but an administrative means "to secure the efficient performance by the steamship company of the duty to examine [the immigrants] in the foreign country, before embarkation, and in carrying out the policy of Congress."

That the exaction of a penalty by an administrative officer is necessarily governed by the rules controlling the prosecution of criminal offenses, is denied. The doctrine declared in Wong Wing v. United States[25] was, therefore, held not to apply.

In Fong Yue Ting v. United States[26] it had been held that the right to exclude or to expel aliens, absolutely or upon conditions, being an inherent and inalienable right of a sovereign and independent nation, Congress had the power to expel as well as to exclude undesirable immigrants, and that this power might be exercised entirely through executive officers. A substantially similar position was taken by the court in Lem Moon Sing v. United States.[27] In the Wong Wing case, however, the court held that Chinese persons might not be imprisoned at hard labor upon order without trial by jury, of an administrative officer acting under the authorization of the provision of the law of 1892 that "any such Chinese person or persons of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States." The court, while holding that the detention or temporary confinement of alien immigrants at the instance of administrative agents might be necessary and was allowable as a means for giving effect to the policy of Congress as established by law, declared that imprisonment at hard labor is an infamous punishment which may be constitutionally ordered only after indictment and trial

[25] 163 U. S 228; 16 Sup. Ct. Rep. 977; 41 L. ed. 140.
[26] 149 U. S. 698; 13 Sup. Ct. Rep. 1016; 37 L. ed. 905.
[27] 158 U. S. 538; 15 Sup. Ct. Rep. 967; 39 L. ed. 1082.

by jury and in a court of justice. "It is not consistent wit theory of our government," the court declare, "that the le ture should, after having defined an offense as an infamous c find the fact of guilt and adjudge the punishment by one o own agents."

By the Railway Rate law of 1906 the Interstate Comm Commission is authorized to issue various orders with refe to the conduct of their business by interstate carriers, and p sion is made that violations of these orders shall be punishab fines and forfeitures which may be recovered in civil suits in name of the United States.

INDEX

INDEX

[References are to pages.]

A

Abduction
from State of fugitives from justice, 228.

Abrogation of Treaties
by Congress, 484, 486.

Acquisition of Territory
by United States, 324.

Adjournment of Congress
may bills be signed after, 569.

Administrative Determinations
constitutional requirements of, 1291.
arbitrary discretion for the issuance of, 1293.

Administrative Discretion
notice in the exercise of, 1312.

Administrative Law
necessity a source of federal power, 62, 503.
administrative discretion, 885.
courts will not perform administrative functions, 1011.
administrative powers of the president, development of, 1158.
administrative appeals, 1161.
administrative decentralization in the States, 1163.
administrative integration, increasing federal, 1163.
administrative interpretations, 1164.
administrative regulations, 1164.
administrative acts, performance of, by the courts, 1274; judicial review of, 1276.
administrative agents, judicial powers of, 1277.
administrative determinations, conclusiveness of, 1278; land patents, 1281; fraud orders, 1283; Chinese exclusion cases, 1286.

Administrative Orders
enforcement of, by mandamus, 1311.

[References are to pages.]

Administrative Ordinances
power to issue, [illegible]
power to establish rates, [illegible]
classification of, [illegible]
army and navy regulations, [illegible]
penal, [illegible]

Admiralty Jurisdiction of United States
extent of, [illegible]
navigability the test, [illegible]
waters wholly within a State, 1110.
canals, 1112.
dry docks, 1112.
political jurisdiction not embraced within, 1113.
courts of, 1113.
state legislative powers, 1114.
federal legislative powers, 1117.
sphere of, a judicial question, 1118.

Admiralty Law
sources of, 1116.
federal legislative power, 1117.

Admission of States
procedure and power of, 320.
a source of power to annex territory, 531.

Ad Valorem Taxes
assessment of, 594.
hearing required, 622.

Advisory Opinions
force of, 13, n.

Agreements
between the States, when permitted, 236.
international, senatorial approval of, 467.

Alaska
annexation of, 324.
treaty provisions as to status of, 333, 419, n.
government of, 364.
an incorporated territory, 438.

Alienation of Territory
federal power as to, 342.
effect of, on citizenship of inhabitants, 443.
by treaty, 507.

[References are to pages.]

Aliens
status of, 245, 248.
domiciled, 249.
not domiciled, 250.
exclusion and expulsion of, 251, 452.
protection of property of, 254.
responsibility of United States for injuries to, 254.
rights of, in the States, 272, 500.
natives of Porto Rico are not, 448.
may commit treason, 833.

Allegiance
nature of, 244.
double, 246.
of inhabitants of occupied territory, 382.

Alliances
between the States, 235.
States may not enter into, 450.

Amendment of the Constitution
first ten amendments restrain the United States, 70.
effect of Fourteenth Amendment upon first ten amendments, 71.
presidential approval of, not needed, 520.
scope of amending clause, 521.

Amendment of Treaties
by the Senate, 462.

Amnesty Acts
constitutionality of, 1172.

Anarchy
see "Speech."

Annexation of Territory
naturalization of inhabitants by, 284.
Articles of Confederation, 326.
debate in Constitutional Convention, 327.
views of Hamilton, Morris and Jefferson, 328.
by treaty and war power, 339.
by statute, 340.
by joint resolution, 344.
consent of inhabitants, 347.
by conquest or military occupation, 380.
by treaty, 392.

Annexed Territory
powers of president to govern, 403.

[References are to pages.]

Arms
right to bear, 846.

Army
obligations assumed by enlistment in, 1193.
see "Military Law."

Articles of Commerce
state taxation of, 711.
see "Commerce."

Articles of War
character of, 1192.

Assessments, Special
justification for, 928.
distinguished from taxes, 929.
constitutional requirements of, 930.
resort to, discretionary with the legislature, 931.
in excess of benefits, 933.
doctrine of Norwood v. Baker, 933.

Assemble
constitutional right to, 845.

Attainder
bills of, 801.

Attorney-General
control of, by president as to institution and prosecution of suits, 1166.

Authentication
of state acts and documents, congressional legislation with reference to, 195.

Autrefois Acquit
see "Jeopardy."

B

Bail
excessive, may not be required, 830.

Banking
is not commerce, 633.

Bankruptcy
definition of, 774.
federal power not exclusive, 775.
state laws and obligations of contracts, 776.
state laws without extraterritorial force, 776.

[illegible]

Bankruptcy - *Continued*
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

Banks
national taxation of, by the States, [illegible]

Beet Sugar
suit regarding, [illegible]

Bequests
in the States, federal taxation of, [illegible]
in the United States, state taxation of, [illegible]

Bills of Attainder
see "Attainder."

Bills of Credit
constitutional provisions regarding, [illegible]
no State may emit, [illegible]
defined, [illegible]
power of States to charter banks to issue circulating notes, [illegible]
interest coupons not, [illegible]

Bills of Exchange
not articles of commerce, [illegible]

Bills of Lading
taxation of, 612.

Bonds
foreign-held, taxation of, 955.

Borrowing Power
of the United States, 626.

Bounties
constitutionality of, 607.

Boundaries
suits between States in settlement of, 1041.

Boxer Trouble
protocol relating to, 470.

Boycott
Danbury hatters' case, 759.

[References are to pages.]

Brown, Justice
views of, in Insular Cases, 412, 421.

C

California
military government of, 388.
status of, after annexation, 393, 419, n.

Canada
annexation of, 326.

Canals
admiralty jurisdiction over, 1112.

Capitation Taxes
are direct taxes, 614.

Capital Stock
state taxation of, of interstate carrier companies, 725, 954.

Captures on Land and Water
power of Congress to make rules for, 798.

Carriages
taxes on, not direct, 614.

Carriers
interstate, state regulation of, 726.
common law applicable to, 729.

Castine
status of, 380.

Certiorari
writ of, to federal officials, may not be issued by state courts, 141.

Charters
of public corporations not contracts, 895.
of private corporations are contracts, 897.
of incorporation strictly construed, 898.

Cherokee Indians
suits relating to, 302.

Child Labor
federal regulation of, 738.

[References are to pages.]

Chinese
[illegible]

Cigarettes
[illegible]

Circuit Courts
[illegible]
appeals from, [illegible]
jurisdiction of, [illegible]

Circuit Courts of Appeal
[illegible]
appeals from, [illegible]
jurisdiction of, [illegible]

Citizenship
federal, defined in Fourteenth Amendment, 176.
right of suffrage not incidental to federal, 155, 537.
of corporations within meaning of Comity Clause, 218.
defined, [illegible]
state and federal, distinguished, 269.
doctrine of Dred Scott case, 302.
effect of Fourteenth Amendment, 270.
national, primary and paramount, 270.
in the Territories, 271.
Wong Kim Ark case, 274.
of Indians, 307.
of inhabitants of District of Columbia, 273, 374.
of inhabitants of ceded territory, 443.
of inhabitants of Hawaii, Porto Rico and the Philippines, 447.
of corporations, 954.
see "Allegiance;" "Aliens;" "Expatriation;" "Indians;" "Naturalization."

Civil Officers
of the United States, when impeachable, 1122.

Civil Rights Act
provisions and constitutionality of, 186.

Civil Service
requirements of, 1180.
ordinances relating to, 1325.

Civil Causes
removal of, from state to federal courts, 129.
jury trial in, 840.
waiver of jury trial in, 841.

[References are to pages.]

Civil War
constitutional theory upon which prosecuted, 88.
military government of territory occupied in, 1219.
confiscation acts in, 1220.
exercise of military authority outside theatre of war in, 1244.
see "War;" "Military Law;" "Declaration of War;" "Habeas Corpus."

Claims
of citizens against foreign States, 468.
see "Court of Claims."

Classifications
and equal protection of the law, 886.
must be reasonable, 887.
see "Taxes."

Cleveland, President
controversy of, with Congress as to furnishing information, 1167.

Coercion of States
constitutionality of, 86.

Coinage
federal ppower of, 780.

Collection of Taxes
modes of, 624.
may not be restrained, 625.

Colonies
power of United States to hold, 334, 358.
see "Territories."

C. O. D. Shipments
state regulation of, 686, 692.

Combinations
see "Anti-Trust Act."

Comity, Interstate
constitutional provisions, 213.
political privileges, 215.
state proprietary interests, 216.
corporations not citizens within meaning of Comity Clause, 218.

Commerce
defined, 631.
transportation essential to, 631.
transportation of persons is, 633.
bills of exchange not articles of, 633.
insurance is not, 634.

[References are to pages.]

Confederations
States may not enter into, 235, 450.

Confiscation Acts
in civil war, 1220.

Congressional Districts
subdivision of States into, 536.

Congressional Elections
federal control of, 543.

Congressional Governments
in the Territories, 369.

Congressional Records
probative value of, 562.

Congress
presumption as to constitutionality of legislation of, 20.
power over District of Columbia, 375.
power to admit new States, 320, 338.
power to govern territories, 351, 367.
power to annex territory by joint resolution, 344.
acts as national legislature when legislating for District of Columbia, 376.
limitations upon powers of, 405.
powers of, in Unincorporated Territories, 411.
obligation to appropriate in enforcement of treaties, 480.
the name, 524.
qualifications of members of, 524.
privileges of members of, 530.
general powers of, 573.
action by, may not be compelled, 573.
power to appropriate money, 588.
absolute and qualified limitations upon, 799.
suspension of habeas corpus, 801.
bills of attainder, 801.
ex post facto legislation, 803.
definition and punishment of crime, 806.
power to punish contempts, 1273.

Conquered Territory
status of, 387.

Conquest
annexation of territory by, 339, 380.

Consent
of inhabitants of annexed territory, 347.

[References are to pages.]

Constitution
United States, supremacy of, 1.
principles of construction of, 12.
Webster's use of term, 38.
to be construed as a whole, 40.
amendment of, 519.

Consumption Tax
nature of, 582.

Contemporaneous Interpretation
force of, 25.

Contempt
power of courts to punish for, 1270.
power of president to pardon for, 1270.
civil and criminal, distinguished, 1271.
power of Congress to punish for, 1272.

Contested Elections
in Congress, 527.
punishment of perjury in connection with, 134.

Contracts
of States, 242.
for personal services not enforceable, 854.
state bankruptcy laws and obligation of, 776.
Federal Government not forbidden to impair obligation of, 874.
how far protected under due process of law, 875.
obligation of, not to be impaired by the States, 891.
changes in manner of enforcement of, 892.
curing technical defects in, 892.
of tax exemption, 892.
to which a State a party, 893.
what constitutes a, 893.
marriage not a, protected by Obligation Clause, 893.
license not a, 894.
permission to foreign corporation to do business, when a, 894.
charter of public corporation not a, 895.
by municipal corporation, 896.
charter of a private corporation is a, 897.
charter grants strictly construed, 898.
police power and obligation of, 902.
of tax exemption, 905.
impairment of, by taxation, 907.
eminent domain and obligation of, 910.
construction of, by federal courts, 911.
once of, a federal question, 912.

[References are to pages.]

Contracts — *Continued*
constitutionality of state laws impairing obligation, of, a federal question, 913.
how far decisions of state courts controlling, 914.
doctrine of cases reaching federal courts from state courts, 916.
refusal of federal courts to follow state decisions holding state laws void alleged to be in impairment of obligation of, 920.
cases based on diversity of citizenship, 920.
rule of Gelpcke v. Dubuque, 922.
extension of this rule, 925.
obligation of, and the Eleventh Amendment, 1080.

Conventions, Constitutional
interpretative value of debates in, 30.

Corporations
taxation of, 105.
not citizens within meaning of the Comity Clause, 218.
federal taxation of, 619.
federal control of, 763.
federal incorporation of, 764.
entitled to equal protection of the law, 882.
regulation of public service, 901.
citizenship of, 984.
federal right to sue in federal courts, 986.

Corporations, Foreign
conditions that may be imposed by States for permission to do business in, 146.
regulation by States where doing business, 695.
state taxation of, 702.

Corporate Securities
taxation of, 595.

Correspondence
international, conduct of, by president, 468.

Copyrights
federal power to grant, 793.
definition of, 794.

Counterfeiting
power of Congress to punish, 781.
passing and uttering, distinct offenses, 781.
of foreign securities, power of Congress to punish, 795.

Courts
power of, to hold legislative acts void, 1.

[References are to pages.]

Courts of Admiralty
jurisdiction of, 1113.

Courts, Federal
issuance of writs of habeas corpus by, 132.
removal of suits to, 129.
writs of error from, to state courts, 120.
independence of, from state control, 141.
proceedings in, may not be enjoined by state courts, 142.
injunctions from, to state courts, 142.
tenure of judges of, 970.
practice in, 970.
inferior, 971.
see "Supreme Court;" "Circuit Courts of Appeal;" "District Courts."

Courts, State
writs of error to, from Supreme Court, 120.
removal of suits from, to federal courts, 125.
may not restrain federal officials, 130, 142.
may not issue mandamus or certiorari to federal officials, 141.

Courts, Territorial
are congressional courts, 369.

Court of Claims
organization of, 973.
jurisdiction of, 982.

Courts of District of Columbia
organization and status of, 973.

Courts-Martial
status and powers of, 1197.
jurisdiction of civil courts to review proceedings of, 1198.
jurisdiction of, over violations of local civil law, 1200.
power of Congress to vest exclusive jurisdiction in, 1203.

Credit
see "Bills of Credit."

Credits
taxation of, 961.

Crime
federal power to punish piracies and felonies on high seas, and offenses against law of nations, 794.
constitutional limitations with reference to federal power to define and punish, 806.
"Jury;" "Jeopardy," etc.

[References are to pages.]

Criminal Law
of the Indians, 302.
federal, statutory in character, 1019.

Criminal Suits
against federal officials, removal of, to federal courts, 128.
state common-law remedies and punishments adopted in federal courts, 1019.

Cruel and Unusual Punishments
constitutional provision as to, 830.

Cumberland Road Bill
veto of, 588.

Customs Laws
application of, to annexed territories, 393.

Cuba
status of, during occupation by the United States, 384, 389, n.

D

Danbury Hatters' Case
doctrines of, 759.

Dawes Act
provisions of, 310.

Dawes Commission
work of, 312.

Debates
in constitutional conventions, interpretative value of, 30.
legislative, interpretative value of, 33.

Declaration of War
power to make, 1208.
see "War."

Declaratory Acts
constitutionality of, 1265.

De Facto Governments
authority of, 158, 244, 386.

Delegation of Legislative Power
to the District of Columbia, 371, 375.
constitutionality of, 1317.
local governmental powers may be delegated, 1317.

[References are to pages.]

Districts
congressional, 536.

District Courts
organization of, 972.
appeals from, 976.
jurisdiction of, 981.

Diversity of Citizenship
jurisdiction of federal courts based on, 984.
suits by or against corporations, 984.

Divorce
decrees of, relation of full faith and credit clause to, 205.
suits for, held actions in personam, 210.

Documents
state, federal taxation of, 118.

Doing Business
state regulation of foreign corporations, 696, 698.
what constitutes, 699.

Domestic Disorder
Dorr's Rebellion, 1236.
powers of military commander in times of, 1240.
suppression of, by federal government, 1215.

Domicile
of aliens, 245, 249.
as determining jurisdiction in divorce proceedings, 206.

Dorr's Rebellion
questions raised by, 156, 1236.

Double Jeopardy
see "Jeopardy."

Double Allegiance
when created, 246, 285.

Double Taxation
constitutionality of, 968.

Dred Scott Case
doctrines of, 260, 262, 353.

Drummers
state taxation of, 705.

Dry Docks
admiralty jurisdiction over, 1112.

[References are to pages.]

Due Process of Law
Slaughter House cases, [illegible]
taxation and, [illegible]
collection of taxes and, [illegible]
legal tender and, [illegible]
definition of, [illegible]
historical meaning of, [illegible]
requirements of not unchangeable, [illegible]
rules as to procedure and procedure may be changed, [illegible]
appeal not essential to, [illegible]
confronting witnesses, [illegible]
trial in court of law not essential to, [illegible]
statutory formalities and, [illegible]
final interpretation of law not guaranteed by, [illegible]
substantive rights and, [illegible]
meaning of per legem terræ, [illegible]
distinction between American and English decisions as to, [illegible]
all departments of government are bound to provide, [illegible]
erroneous interpretation of law as a denial of, [illegible]
in Ex parte, [illegible]
administrative determinations, [illegible]

Duty
defined, [illegible]
see "Exports," "Imports."

E

Eight Hour Law
federal, [illegible]

Ejection
action of against state officials, 1060.

Election of Representatives
constitutional provisions as to, 537.
federal control of, [illegible]

Electors
presidential, appointment of, 1125.

Eleventh Amendment
does not apply to suits instituted by a State, 122, 1070.
see "Liability of States."

Eminent Domain
federal exercise of, in the States, 119.
federal power of, [illegible]
and obligation of contracts, 910.

[References are to pages.]

Enabling Acts
province of, 321.

Enlistment
in army and navy, obligations assumed by, 1193.

Equality
in taxation, 593.
of the States, 239.

Equal Protection of the Law
constitutional guarantee of, 186.
taxation and, 593.
constitutional provision as to, 873, 881.
definition of, 881.
corporations entitled to, 882.
administrative discretion and, 885.
political rights not concerned, 886.
classifications and, 886.
classifications must be reasonable, 887.
laws and judicial systems not required to be uniform throughout the State, 888.
similar, but not the same, privileges required, 889.

Equity
in federal courts, 1024.

Error
writs of, from federal to state courts, 120.

Established Religion
prohibited to the United States, 841.

Evidence
rules of, in federal courts, 1026.

Exchange
bills of, not articles of commerce, 633.

Excise
defined, 582.

Exclusion of Aliens
power of United States as to, 25, 452.

Exclusion of Commodities
power of States as to, 678.
from the mails, 784.

Exclusive Powers
federal, 73.

[References are to pages.]

Executive Departments
see "Departments."

Executive Practice
[illegible]

Exemptions
[illegible]
[illegible]

Exportation
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

Expository
[illegible]

Export
[illegible]

Ex Post Facto Legislation
[illegible]
[illegible]

Express Powers
[illegible]

Express Limitations
[illegible]

Express C. G. D. Orders
[illegible]
see "Layout."

Express Companies
[illegible]

Expulsion
[illegible]

Extradition
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

[References are to pages.]

Extradition — *Continued*
habeas corpus in, 227.
abduction and forcible return of fugitives from justice, 228.
trial for offenses other than those for which, is had, 231.
who are fugitives from justice, 232.
international, 479.

Extraterritoriality
doctrine of, 244.

Extrinsic Evidence
resort to, 27.

F

Federal Agencies
state taxation of property of, 95.

Federal Franchises
state taxation of, 99.

Federal Powers
express and implied, 54.
liberally construed, 55.
administrative necessity a source of, 62.
international responsibility a source of, 64.
exclusive and concurrent, 73.

Federal Territory
status of, 378.

Federalist, The
interpretative value of, 31.

Fellow Servant Doctrine
modified by statute, 741, 743.

Felonies
on high seas, federal power to punish, 794.

Fictitious Citizenship
jurisdiction by, in federal courts, 987.

Fifth Amendment
see "Due Process of Law;" "Jury."

Fifteenth Amendment
enforcement of, 550.
does not directly confer suffrage, 538.

Fines
excessive, may not be imposed, 830.

[References are to pages.]

Fourteenth Amendment — *Continued*
provisions of, as to apportionment of representatives among the States, 533.
see "Citizenship;" "Due Process of Law;" "Equal Protection;" "Police Power."

Franchises
federal, state taxation of, 99.
taxation of, 106, 945, 966.

Fraud Orders
power to issue, 63, 791, 1283.

Freedom of the Press
constitutional provision as to, 424.
exclusion from the mails and, 784.

Freedom of Speech
constitutional provision as to, 424.

Freight Trains
state regulation of, 663, 666.

Fugitive Slaves
constitutional provision as to, 234.
law regulating surrender of, 123.

Fugitives from Justice
see "Extradition."

Full Faith and Credit Clause
congressional legislation in definition and enforcement of, 195.
does not apply to Territories or District of Columbia, 196.
does not apply to criminal causes, 197.
establishes a rule of evidence, 198.
statutes of limitations, 199.
statutory rights of action, 199.
judgments in rem and in personam, 201.
conveyances of land by order of court, 202.
nul tiel record, 202.
tax exemptions, 204.
marriage and divorce, 205.

G

Game Laws
state, and interstate commerce, 676.

General Welfare
meaning of, 39.

[References are to pages.]

Good Will
taxation of, 967.

Governments
de facto and de jure, 158, 165, 386.
state, federal control of form of, 151.
presidential, 151.
republican form of, defined, 151.

Governor of a State
powers of, contrasted with those of the president, 1167, n.
power of, to remove from office, 1187, n.

Gross Receipts
see "Receipts."

Guam
annexation of, 325.

Guana Islands
annexation of, 324, 340.

Guarantees
constitutional, waiver of, 813.

H

Habeas Corpus
writs of, from state courts for release of persons in federal custody, 130.
issuance of writs of, by federal courts, 132.
the Neagle Case, 135, 1152.
writ of, issue only when imperative, 136.
what action to be taken by federal court upon return of, 138.
in extradition proceedings, 227.
suspension of writ of, 801, 1244.
jury not required in proceeding in, 809.
writ defined, 1253.
power to suspend and effect of, 1254.
power of president to suspend, 1255.

Hague Conferences
arbitration treaties under conventions of, 473.

Hamilton
views of, as to annexation of territory, 328.

Hawaiian Islands
annexation of, 325, 338, 345.
government of, 364.
status of, 432.
jury trial in, 433.

[References are to pages.]

Hay Treaties
of arbitration, 473.

Headmoney
tax, 578.

Hearing
required in tax proceedings, 621.
before administrative tribunals, 622.

Hepburn Act of 1906
provisions of, 762.

High Seas
see "Piracy."

High Treason
see "Treason."

House of Representatives
vacancies in, how filled, 560.
conclusiveness of records of, 562.
constitutional force of rules of, 564.
origination of bills for revenue in, 566.
see "Elections."

I

Immigration
headmoney tax, 578.
state inspection laws, 672.
power of administrative officials, 1289.
see "Chinese Exclusion."

Immunity
see "Self-Incrimination."

Impeachment
jury trial not required, 806.
constitutional provisions, 1121.
persons subject to, 1121.
when civil officers may be impeached, 1122.
offenses for which impeachment will lie, 1123.
punishment upon conviction, 1124.
effect of dissolution of Congress upon, 1124.

Implied Powers
definition of, 54, 61.
administrative necessity a source of, 62.
international responsibility a source of, 64.

[References are to pages.]

Imposts
defined, 582.

Income Tax
upon federal securities, 107.
constitutionality of, 616.

Incorporation of Annexed Territories
views of Jefferson, 330.
constitutional questions relating to, 405.
no definite criterion of, 437.
see "Insular Cases;" "Territories."

Incorporeal Hereditaments
taxation of, 945.

Indians
legal status of, 292.
lands of, 292.
tribal autonomy of, 295.
federal power over, 298.
commerce with, 298, 773.
sale of liquor to, 299, 316.
congressional legislation relating to, 300.
federal police control of, 301.
status of tribal, 302.
naturalization of, 307.
disappearance of tribal autonomy, 307.
Dawes Act, 310.
Dawes Commission, 312.
taxation of property of, 315.
Five Civilized Tribes, 317.

Indian Territory
state enabling act, 318.

Infamous Crimes
jury trial demanded in, 811.
definition of, 812.

Inferior Federal Courts
do not include territorial courts, 371.
see "Circuit Courts of Appeal;" "Circuit Courts;" "District Courts."

Inferior Officers
who are, 1175.
Congress may regulate the removal of, from office, 1185.

Information to Congress
duty of president to furnish, 1167.

[References are to pages.]

Inherent Sovereign Powers
existence of, examined, 66, 454.

Inheritance Taxes
constitutionality of, 581.
state, 599.
federal, 602.

Injunctions
from state to federal courts, and from federal to state courts, 142.
to restrain state officials, 1074, 1091.
to prevent removal of federal officers, 1185.
to the president, 1301.

Insolvency
see "Bankruptcy."

Inspection Laws
state, 670, 688.
tobacco, 671.
immigration, 672.

Insular Cases
examination of, 361, 407, 411.

Insurance
business of, not commerce, 634.
tax on, not direct, 615.

Insurance Companies
restrictions upon right of, to remove suits into federal courts, 146.

Intangible Personal Property
taxation of, 955.
foreign held bonds, 955.
shares of stock, 957.
mortgages, 960.
credits, 961.
franchises, 966.
good will, 967.

Intent
to export, 641.

Internal Improvements
power of Congress to appropriate for, 588.

Intercourse
commerce is, 633.

INDEX

(References are to pages.)

[illegible]
[illegible]

[illegible]
[illegible]

[illegible]
[illegible]

[illegible]
[illegible] of the Commission, 150.
[illegible]
[illegible]
[illegible]
[illegible]

[illegible]
[illegible]
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[illegible]
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[illegible]
[illegible]
[illegible]
state power to exclude articles of commerce, 673.
[illegible]
[illegible]
[illegible]
foreign corporations doing an interstate commerce business, 695.
[illegible]
[illegible]
[illegible] laws discriminating against products of other States, 703.
[illegible] of drummers, 705.

[References are to pages.]

Interstate Commerce — *Continued*
peddlers, 709.
state taxation of articles of commerce, 711.
articles in transit, 712.
persons in transit, 714.
state taxation of property of interstate carriers, 714.
state taxation of vessels, 716.
rolling stock, 717.
unit of use rule, 719.
taxation of receipts, 720.
capital stock of interstate carrier companies, 725.
state regulation of interstate railway rates, 728.
federal legislative power, 734.
federal police power over, 735.
prohibition of, 736.
federal regulation of child labor, 738.
federal employers' liability law, 739, 743.
federal safety appliances acts, 744.
trade unions and, 746.
regulation of railway rates, 748.
manufacturing not included within, 752.
Merger Case, 736.
Beef Trust Case, 758.
Danbury Hatters Case, 759.
Commodities Clause of Hepburn Act, 762.
Hepburn Act, 762.
federal control of industrial combinations, 763.
right of state manufacturing companies to engage in, 766.
federal taxation of, 767.
navigation, 768.

Involuntary Servitude
see "Slavery."

Irrigation
suit between Kansas and Colorado, 1048.

J

Jackson
veto of Maysville Road Bill, 590.

Jefferson
views of, as to annexation of Louisiana, 328.
as to "incorporation" of Territories, 330.

Jeopardy, Double
in Philippines, 439.
constitutional provision, 816.
what constitutes, 818.
right of appeal, 820.

[References are to pages.]

Joint Resolution
annexation of Texas by, 344.
annexation of Hawaii by, 345.
see "Resolutions."

Journals of Congress
probative value of, 562.

Judges
responsibility of, for malicious or ultra vires acts, 1315.

Judicial and Legislative Acts
distinguished, 1264.

Judiciary
see "Courts."

Judiciary Act of 1789
provisions of, 120, 121, 124, 127, 132, 144.

Judicial Power of United States
extent of, 1052.
see "Suits between States."

Judicial Procedure
legislative control of, 1267.

Judgments
in rem and in personam, credit of, in other States, 201.
territorial force of federal, 197.

Jurisdiction
of federal courts based on diversity of citizenship, 984.
concurrent, of state and federal courts, 990.
Congress cannot confer, on state courts, 997.
political questions, 999.
and judicial power distinguished, 1268.
federal, based on cases arising under Constitution, treaties and acts of Congress, 987.

Juries
exclusion of negroes from, 189.

Jury
trial by, guaranteed, 806.

Jury Trial
in the Territories, 433, 437, 807.
not a fundamental right, 436, 815.
in District of Columbia, 807.
unanimity of verdict, 807.

[References are to pages.]

Jury Trial — *Continued*
twelve jurors required, 808.
actions in which, not required, 808.
petty offenses, 810.
infamous offenses, 811.
waiver of right to, 813, 841.
in civil suits, 840.

Jus Sanguinis
principle of, 285.
see "Citizenship."

Jus Soli
see "Citizenship."

K

Kent
doctrine of, as to unconstitutional legislation, 3, 5, n., 8, n.

Kentucky
contested gubernatorial election in, 171.

L

Land
conveyance of, under order of court, 202.
conclusiveness of patents issued for, 1280.
Indian, 292.
allotment of, in severalty to Indians, 310, 312.
tax on, direct, 614.

Law of Nations
power of United States to punish offenses against, 794.
see "International Law."

Legacies
taxation of, 606.
see "Inheritance Taxes."

Legal Tender Acts
constitutionality of, 626.

Legislation
process of, as constitutionally determined, 561.

Legislative Power
delegation of, 154, 1317.
of Congress in the District of Columbia, 371.
see "Delegation of Legislative Power."

[References are to pages.]

Malice
responsibility of public officials for acts done with, 1312.

Mandamus
from federal to state courts, 144.
to compel action by state officials, 1074, 1077, 1079.
to reinstate in office, 1186.
to compel administrative action, 1296.
in place of appeal, 1298.
power of courts of District of Columbia to grant, 1299.
to the president, 1300.
to head of executive department, 1304.
to compel obedience to order of administrative superior, 1311.

Manufactures
taxation in aid of, 585.
not a part of commerce, 640, 752.
federal power to incorporate, companies for, in the States, 764.

Marine Insurance
not commerce, 635.

Maritime Jurisdiction of United States
see "Admiralty."

Marque and Reprisal
letters of, power of Congress to grant, 798.

Marriage and Divorce
relation of, to Full Faith and Credit Clause, 205.

Martial Law
compatible with republican form of government, 161.
defined, 1228.
a form of police power, 1229.
does not abrogate civil law and civil law guaranties, 1234.
distinguished from military government, 1236.
martial rule and war distinguished, 1238.
powers of military commander in times of domestic disorder, 1240.
in time of civil war, 1241.
jurisdiction of military tribunals outside of theater of war, 1244.
see "Military Law."

Maryland
surrender of lands by, 326.

Maysville Turnpike Bill
veto of, 588.

Mexico
treaty of United States with, 393, 419, n.

[illegible]

Military [illegible]

[illegible]

Military [illegible]

[illegible]

Military Law

[illegible]

Military Occupation

[illegible]

Military Tribunals

[illegible]

Militia

[illegible]

organization and disciplining of [illegible]

[illegible]

use of, to suppress domestic disorder [illegible]

Milligan Case

[illegible]

Ministerial Acts

[illegible] performance of, 1297.

[References are to pages.]

Misprision of Treason
defined, 840.

Modus Vivendi
power of president to enter into a, 471.

Money
power of Congress to appropriate, 588.

Monroe
constitutional views of, 589, n.

Monstrans de Droit
function of, 1062.

Mortgages
taxation of, 960.

Motives
legislative, not subject to judicial inquiry, 18.

Movables
taxation of, 954.

Municipal Corporations
distinction between public and private functions of, 117, n.
exemption of property of, from federal taxation, 114.

N

Nationality
see "Citizenship."

National Banks
taxation of, 92, 108.
taxation of circulating notes of, 107.
regarded as citizens of States in which located for purposes of jurisdiction in federal courts, 986.

National Guard
see "Militia."

Naturalization
nature of, 267, 277.
by statute, 280.
determining conditions of, a legislative function, 281.
granting of, a judicial function, 281.
retroactive effect of, 283.
by annexation of territory and by treaty, 284.
of Indians, 367.
federal power of, exclusive, 774.
see "Citizenship."

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[References are to pages.]

Northwest Territory
ordinance for government of, 239, 325, 332, 362.

Nul Tiel Record
plea of, in suits on foreign judgments, 202.

O

Obligation of Contracts
see "Contracts."

Occupation
military, 245, 1218.
annexation of territory by, 380.

Occupations
federally licensed, state taxation of, 101.

Office
public, not a property or contract right, 166.
suits between claimants to, 168.
federal, definition of, 528.

Officers
injunction to prevent removal of, 1185.
mandamus to reinstate, 1186.
power of state governors to remove, 1187, n.
federal, appointment and removal of, 1174.
of United States, defined, 1175.
inferior federal, 1175.
nomination of, 1176.
power of Congress to appoint, 1178.
civil service requirements as to appointment of, 1180.
removal of, 1181.
Congress may control removal of inferior federal, 1185.
taxation of federal, 1176.
liability of the State for acts of, 1309.
liability of, to private individuals, 1310, 1312.

Oleomargarine
constitutionality of laws regulating, 23, 694.
taxation of, 580.
administrative ordinances relating to, 1328.

Ordinances
administrative, power to issue, 1318.
establishing railway rates, 1323.

[References are to pages.]

Organized Territories
status of, 438.

Original Package
doctrine of, 643.
difficulties in application of doctrine of, 645.
size of, 648.

P

Pardons
power of president to grant, 1170.
Congress has no power to limit granting of, 1171.
amnesty acts, 1172.
remission of penalties by Congress and by administrative officials, 117
suspension of sentences, 1173.

Parens Patriæ
State as, 1047.

Patent Rights
state taxation of, 100.
power of Federal Government to grant, 792.
distinct from the property created by application of, 792.
state power to regulate, 793.

Peddlers
state taxation of, 709.

Penal Ordinances
power of administrative officials to issue, 1327.

Penalties
remission of, by Congress and by administrative officials, 1172.

Peonage
illegality of, 850.

Perjury
at contested congressional elections, 134.

Personal Property
taxation of income from, 618.
taxation of tangible, 946.

Personal Services
enforcement of contracts for, 854.

Persons
transportation of, is commerce, 633.

Petit Treason
see "Treason."

[References are to pages.]

Petition
constitutional right to, 845.

Petition of Right
function of, in English law, 1062.

Petty Offenses
jury trial not necessary, 810.

Philippines
annexation of, 325.
government of, 365.
status of, after treaty of cession, 402.
act of March 2, 1901, 403.
act of July 1, 1902, 404.
slavery in, 442.
see "Insular Cases."

Piracies
federal power to punish, 794.

Police Power
of the States, 188, 191, 661.
federal, over interstate, commerce, 735.
obligation of contracts and, 902.
defined, 1231.
martial law a form of, 1229.
limitations upon, 1232.

Political Questions
definition of, 999.
status of Indian tribes, 999.
military government, 1001.
existence and extent of sovereignty, 1003.
war, belligerency, and neutrality, 1003.
treaties, 1007.
recognition of diplomatic agents, 1007.

Polygamy
not protected as a religious practice, 842.

Porto Rico
annexation of, 325.
status of, under military government, 385.
government of, 364.
application of tariff laws to, 396.
doctrine of the Dooley case, 400.
uniformity of taxation as applied to, 411.
inhabitants of, not aliens, 448.
see "Insular Cases."

[References are to pages.]

President — *Continued*
power of, to appoint and remove officers, 1174.
powers of, contrasted with those of state governors, 1167, n., 1187, n.
powers of, as commander-in-chief of army and navy, 1207.
power of, to declare war, 1208.
power of, to establish and maintain military governments, 1222.
power of, to suspend writ of habeas corpus, 1255.
amenability of, to judicial process, 1300.
obligation of, to enforce laws believed by him to be unconstitutional, 1306.

Presidential Electors
power of United States to compel appointment of, 555.
appointment of, 1125.
vacancies in, 1127.

Presidential Governments
of Territories, 380, 388.

Presidential Succession
constitutional provisions, 1141.
act of 1792, 1141.
act of 1886, 1144.
third term tradition, 1147.

Press
freedom of, 424, 842.
anarchistic publications, 843.
seditious libel, 845.

Privileges and Immunities, Federal
protected against state abridgment, 176.
no additional, created by the Fourteenth Amendment, 177.
enumeration of, 179, n., 181.

Property
federal, state taxation of, 102.
of federal agencies, state taxation of, 95.

Proprietary Interests
state contracts relating to, 242.

Prize
federal jurisdiction in cases of, 1107.

Production
not included within commerce, 640.

Prohibition
of lotteries in interstate commerce, 736.
of child labor products in interstate commerce, 738.

[References are to pages.]

Protective Tariff
constitutionality of, 667.

Protocol
definition of, 469.
[illegible], 470.
San Dominican, 471.

Public Corporations
charters of, not contracts, 805.

Public Office
not a property or contract right, 166.

Public Purpose
taxation must be for a, 585.

Public Service Corporations
regulation of charges of, 901.

Public Trial
constitutional provision for, 816.

Punishments
see "Cruel and Unusual."

Q

Quarantine
state, 674.
federal, 676.

Quartering Troops
constitutional provision regarding, 848.

Quasi-Sovereign Rights
of the States, 1053.

Quorum
in Congress, 564.

R

Races
separation of, in public conveyances, 852.

Railroads
federally chartered, state taxation of, 96, 99.
taxation in aid of, 585.
taxation of, 949, 954.
Rule, 950.

[References are to pages.]

Railway Rates
administrative establishment of, 1323.
grant to corporations of right to fix, 909.
regulation of interstate, 748.
delegation of power to regulate, 749.
injunctions by federal courts to restrain state officials from enforcing, 1091.
state regulation of, 728.

Ratification
of treaties, 465.

Real Estate
tax on succession to, not direct, 615.

Receipts
of interstate carriers, state taxation of, 720.

Recess
of Congress, signing bills during, 571.

Reclamation
of arid lands, federal power over, 1051.

Reciprocity
agreements for, 477.

Recognition
of sovereignty of foreign states, 461.

Reconstruction
of Southern States, 161, 1222.
see "Military Government."

Referendum
constitutionality of, 154, 1324.

Regulations
administrative, 1164.

Reinstatement
of officers, mandamus to compel, 1186.

Religious Freedom
constitutional guarantee of, 423, 841.

Removal from Office
power of president, 1174.
of inferior officers may be regulated by Congress, 1185.
injunctions to prevent, 1185.
powers of state governors, 1187, n.

[References are to pages.]

Removal of Suits
from state to federal courts, 124, 789, 994.
state restrictions upon, 145.

Representatives to Congress
qualifications of, 524.
qualifications determined by the House of Representatives, 525.
privileges of, 530.
apportionment of, among the States, 523.
right to vote for, a federal right, 540.
power of United States to compel election of, within the States,

Republican Form of Government
constitutional guarantee of, 115.
definition of, 151.

Reserved Rights
of the States, and the treaty-power, 495.

Resolutions
joint and concurrent, presidential approval of, 568.

Resulting Powers
definition of, 65.

Retroactive Legislation
constitutionality of, 1265.

Revenue Bills
orignation of, in house of representatives, 566.

Revenue Laws
application of, to annexed territory, 392.
modification or repeal of, by treaties, 488.

Revenue Officials
removal of suits against, to federal courts, 125.

Rhode Island
Dorr's Rebellion in, 156, 158.

Riders
constitutionality of, 569.

Riots
responsibility of United States for injuries to foreigners in, 259.

Roberts
exclusion of, from house of representatives, 526.

[References are to pages.]

Rolling Stock
state taxation of, 717.

Roosevelt
constitutional doctrines of, 47.

Rules of Congress
constitutional force of, 564.

S

Safety Appliances
on trains, federal law providing for, 735, 744.

Salaries
federal, state taxation of, 102.
state, federal taxation of, 113.

Sales
at boards of trade, taxation of, 618.
of articles imported included within interstate commerce, 642.

San Domingo
protocoi relating to, 471.

Seamen
compulsory service of, not involuntary servitude, 853.

Searches and Seizures
federal power to examine the mails, 784.
constitutional provision as to, 828.
corporations protected, 829.

Secession
unconstitutionality of, 85.

Securities
state taxation of federal, 103.

Seditious Libel
power of Congress to define to punish, 845.

Self-Incrimination
immunity from, 823.
what constitutes, 825.
right to immunity from, may be waived, 825.
when right to immunity from, may be claimed, 826.
immunity from, must be complete, 826.
corporations not protected against testimony of their agents, 827.
production of private books and papers, 828.

[References are to pages.]

Senate
treaty-making powers of, 455.
negotiation of treaties by, 458.
amendment of treaties by, 462.
vacancies in, how filled, 564.
approval of, not required as to certain international agreements, 4

Senators
qualifications of, 524.
qualifications of, determined by senate, 525.
privileges of, 530.
power of United States to compel the election of, 555.
election of, 557.
act of 1866, 558, n.
popular election of, 559.

Sentences
suspension of, 1173.

Separation of Powers
constitutional principle of, 1259.
not compulsory upon the States, 1260.
provisions of the Constitution, 1261.
not complete, 1262.
general principle of, stated, 1263.
legislative and judicial acts distinguished, 1264.
declaratory and retroactive legislation, 1265.
legislative control of judicial procedure, 1267.
performance of administrative acts by the courts, 1274.
power of courts to punish contempts, 1270.
power of Congress to punish contempts, 1274.
judicial review of administrative determinations, 1276.
judicial powers of administrative agents, 1277.
conclusiveness of administrative determinations, 1278.
fraud orders, 1283.
Chinese exclusion cases, 1286.

Service
actual, required in actions in personam, 201.
in divorce proceedings, 206.

Servitude
see "Slavery."

Set Off
in suits against the States, 1096.

Sex
citizenship or suffrage not dependent upon, 185.

[References are to pages.]

Sherman Anti-Trust Act
see "Anti-Trust Act."

Slaughter House Cases
doctrines of, 177, 192.

Slavery
in the Philippines, 442.
prohibition of, 849.
enforcement of Thirteenth Amendment, 848.
peonage, 850.
Civil Rights cases, 851.
compulsory service of seamen is not, 853.
contracts for personal services, 854.

Slaves
fugitive, 234.
importation of, 800.

Slave Trade
declared piracy, 795.

Southern States
reconstruction of, 161.

Sovereignty
inherent powers of, 66.
existence and extent of, a political question, 1003.
international, of the United States, 64.
territorial, 244, 246.
de facto and de jure, 337.
recognition of, 461.

Spanish-American Treaty
provisions of, as to citizenship, 445.
see "Porto Rico;" "Philippines."

Speech
freedom of, in Congress, 530.
constitutional guarantee of freedom of, 842.

Special Assessments
see "Assessments."

Speedy Trial
constitutionally guaranteed, 815.

Spirit of the Constitution
constructive principle of, 43.

Stamp Taxes
on state documents, 118.

[References are to pages.]

Stare Decisis
doctrine of, as applicable to constitutional law, 51.

State
Indian tribe not a, 302.
District of Columbia not a, 375.

States
presumption as to constitutionality of laws of, 22.
strict construction of reserved rights of, 41, 58.
courts of, writs of error to, from Supreme Court, 80.
may not be coerced, 86.
secession by, illegal, 85.
federal taxation of government agencies of, 92, 110.
officials of, may not be compelled to perform federal duties,
may not tax federal agencies, 95.
may not tax federally chartered railroads, 96.
may not tax federal franchises, 99.
may not tax patent rights, 100.
may not tax federal salaries, 102.
may not tax federal property, 102.
may not tax federal securities, 103.
salaries of officials of, may not be federally taxed, 113.
conditions imposed by, upon foreign corporations, 146.
autonomy of, preserved, 151.
offices of, suits between claimants to, 168.
proprietary privileges of, 216.
compacts between, 235.
compacts between, and the United States, 238, 1057.
equality of, 239.
admission of, 239, 320, 335.
citizenship of inhabitants of, 261, 272.
suits between, 302, 1009, 1040.
control of, over Indians, 306.
admission of, as a source of federal power to annex territory,
forbidden to enter into treaties, alliances, or confederations,
reserved rights of, and the treaty power, 495.
police powers of, and interstate commerce, 661.
prohibitions upon, 877.
laws of, in federal courts, 1020.
boundary disputes between, 1041.
mal-administration of laws of, as cause of action, 1044.
as parens patriæ, 1046.
quasi-sovereign rights of, 1053.
suits of, against individuals, 1054.
suits between, and foreign States, 1059.
suability of, 1061.
administrative decentralization in, 1163.

[References are to pages.]

Statehood
conditions of, 239.
see "Territories,"

Stock
acquisitions of, may not be federally controlled, 757.
taxation of, 104, 957.

Strict Construction
a corollary of States' Rights doctrine, 58.

Subpœna
to the president, 1300.

Succession
tax on, 605.
presidential, see "Presidential Succession."

Sugar
tax on manufacture of, 619.

Suffrage
restricted, compatible with republican form of government, 164.
not incidental to federal citizenship, 185, 537.
not given directly by Fifteenth Amendment, 538.
in elections of members of Congress a federal right, 540.

Suability of States
English doctrine of, 1062.
views of Hamilton and Madison, 1063.
the Eleventh Amendment, 1064.
corporations of which its State is a shareholder, 1073.
suits against officers of the State, 1074.
rule as to States being parties of record, 1078.
obligation of contracts, and, 1086.
recovery of property held by the State, 1096.
set-offs, 1096.
liens, 1097.
Arlington Case, 1099.
possessory actions against state officials, 1101.
suability of minor political bodies, 1104.
consent of State to suit, 1105.

Supreme Court
writs of error from, to state courts, 80, 978.
established by Constitution, 970.
organization of, 971.
original jurisdiction of, 973.
appellate jurisdiction of, 975.
appeals from circuit courts, 976.
appeals from circuit courts of appeal, 977.
appeals from territorial courts, 978.

[References are to pages.]

Suspension of Writ of Habeas Corpus
see "Habeas Corpus."

T

Taney
street constructionist views of, 83.
views of, as to power to annex territory, 334.

Tangible Personal Property
taxation of, 946.

Tampico
status of, 381.

Tariff
application of laws to annexed territory, 392.
protective, 607.
powers of president under law of 1890, 1319.
see "Revenue Laws."

Taxation
of federal governmental agencies, 92.
of national banks, 92, 108.
of property of federal agencies, 95.
of federally chartered railroads, 96.
of patent rights, 100.
of federal salaries, 102.
of federal securities, 103.
of income from federal securities, 107.
of shares of stock, 104.
of circulating notes of national banks, 107.
of state agencies by United States, 110.
of state salaries, 113.
of property of municipalities, 114.
of state agencies for sale of liquor, 114.
of state documents, 118.
of property of Indians, 306, 314.
direct, in District of Columbia, 372.
uniformity of, in territories, 411.
federal powers of, 575.
extent of powers of, 577.
due process of law and, 583, 621.
equality in, 593.
uniformity in, 596.
what cconstitutes uniformity, 598. See "Classifications."
state, and foreign commerce, 699.
state, and discrimination against interstate commerce, 703.
of drummers, 705.

[References are to pages.]

Taxation — *Continued*
of commission merchants, 708.
of peddlers, 709.
of articles of commerce, 711.
of articles in transit, 712.
of persons in transit, 714.
of property of interstate carriers, 714.
assessment of property of interstate carriers, 716.
situs of vessels for purposes of, 717.
of rolling stock, 717.
unit of use rule, 719, 950.
of express companies, 718, 951.
of receipts from interstate commerce, 720.
of capital stock of interstate carrier companies, 725, 954.
impairment of contracts by, 907.
limitations upon powers of States, 927.
special assessments, 928.
property must be within the jurisdiction, 943.
personal liability of property-owners, 944.
of incorporeal hereditaments, franchises, 945, 966.
of tangible personal property, 946.
of property in several jurisdictions, 949.
of movables, 954.
of intangible personal property, 955.
of foreign held bonds, 955.
of stock, 957.
of mortgages, 960.
of credits, 961.
of good will, 967.
double, 968.

Taxes
export, 440.
defined, 575.
levying of, a legislative act, 575.
power to impose, distinct from eminent domain, 576.
must be for a public purpose, 585.
headmoney, 578.
immigration, 578.
wharves, use of, 580.
oleomargarine, 580.
inheritance, 581.
in aid of railways, 585.
in aid of manufactures, 585.
corporate securities, 595.
ad valorem, 594.
state inheritance, 599.
federal inheritance, 602, 620.

[References are to pages.]

Taxes — *Continued*
direct, 603, 613.
on successions, 605.
on legacies, 606.
protective tariff, 607.
bounties, 607.
export duties, 608.
on tobacco, 612, 618.
stamp, 612.
bills of lading, 612.
on lands, 614.
on insurance companies, 615.
on succession to real estate, 615.
income, 616.
income from personal property, 618.
sales at boards of trade, 618.
federal corporation tax of 1909, 619.
license, and interstate commerce, 701.
on foreign commerce, 699.
on foreign corporations, 702.
exemptions of, 892, 905.

Taxing Power
extent of, 577.
use of, for administrative purposes, 578.
federal, limitations upon, 582.

Technical Terms
construction of, 28.

Telegraph Companies
state regulation of, 666.

Tenure of Office
see "Officers."

Territorial Courts
are congressional agencies, 369.
appeals from, to Supreme Court, 978.

Territorial Governments
are congressional agencies, 369.
classes of, 364.

Territories
full faith and credit clause does not apply to, 196.
citizenship in, 273.
admission of, as States, 320.

[References are to pages.]

Territories — *Continued*
annexation of, 324.
annexation of Louisiana, 328.
incorporation of, 330.
status of, as embryo States, 332.
annexation of, under treaty or war power, 339.
annexation of, under general international powers, 340.
annexation of, by statute, 340.
alienation of, 342, 507.
purposes for which, and modes by which, may be annexed, 344.
annexation by joint resolution, 344.
consent of inhabitants for annexation of, 347.
power of Congress to govern, 351, 362.
Dred Scott case, 353.
military government of, 380.
annexation of, by conquest or military occupation, 380.
conquered, status of, 387.
presidential governments in, 388.
annexation of, by treaty, 392.
powers of president in, prior to congressional action, 403.
distinction between incorporated and unincorporated, 405.
status of, after annexation, 406.
views of Justice Brown as to status of, 412, 421.
citizenship in, ceded, 442.
commerce with, 773.

Texas
annexation of, 324, 344.

Third Term
presidential, 1147.

Tobacco
taxation of, 612, 618.
state inspection laws, 671.

Trade Unions
federal legislation relating to, 746.

Trains
interstate, state regulation of, 666.

Transit
state taxation of articles in, 712.

Transportation
essential to commerce, 631.

[References are to pages.]

Treason
power of Congress to define and punish, 833.
statutory provisions as to, 833.
may be committed by aliens, 834.
domicile not necessary, 834.
no petit treason in United States, 835.
what constitutes, 835.
enlistment of men does not constitute, 835.
against State of the Union, 839.

Treaties
between the States forbidden, 235.
annexation of territory by, 392.
citizenship in territories annexed by, 444.
negotiation of, 456.
amendment of, by senate, 462.
ratification of, 465.
agreements not requiring senatorial approval, 467.
enforcement of, 480.
appropriation of money in enforcement of, 480.
abrogation of, 494, 513.
to be executed with uberrima fides, 505.
date of taking effect, 517.
denunciation of, 518.
construction of, 518.

Treaty Power
annexation of territory under, 339.
may not incorporate territory, 416, 428.
naturalization under, 446.
federal power exclusive, 450.
federal power comprehensive, 451.
manner of exercise of, 455.
of the senate, 458.
foreign States held to knowledge of constitutional location of,
constitutional extent of, 493.
reserved rights of the States and, 495.
legislative power ancillary to, 506.
alienation of territory by, 507.

Troops
quartering of, 848.

Trusts
see "Anti-Trust Act;" "Interstate Commerce."

Twelfth Amendment
provisions of, 1129.
see "Presidential Electors."

[References are to pages.]

U

Ultra Vires Acts
of public officers, responsibility for, 1310.

Unconstitutional Law
doctrine of Marbury v. Madison examined, 2.
force of, 10.

Uniformity in Taxation
application of principle of, to unincorporated territories, 411.
what constitutes, 596.
see "Classifications."

Unit of Use Rule
in taxation, 719, 950.

Unincorporated Territories
status of, 405.

United States
term includes District of Columbia, 372.
meaning of term, in international law, 406, n.
definition of term in insular cases, 417.
suits against, by States, 1057.

Unreasonable Rates
see "Rates."

Upper California
military government in, 388.

Unwritten Laws
force of, 41.

V

Vacancies
in senate, how filled, 559.
in house of representatives, how filled, 560.

Vessels
situs of, for purposes of taxation, 717.

Veto Power
of the president, 567.
parts of bills may not be vetoed, 568, 1307.

Vice-President
election of, see "President."

[References are to pages.]

Virginia
debt controversy of, 1084.

W

Waiver
of constitutional guarantees, 813.

War
defined, 795.
civil war, 796.
declaration of, 796, 1208.
power of president to declare, 797.
articles of, 1192.
powers of military courts in time of, 1206.
prosecution of, 1212.
States may not declare, 1238.
distinguished from martial rule, 1238.
martial law in time of, 1241.

War Power
annexation of territory under, 339.

We the People
meaning of, 36.

Webster
views of, as to unconstitutional legislation, 4, 8, n.
use of term "Constitution" by, 38.
argument of, in Luther v. Borden, 159.
position of, in Thrasher's Case, 246.

Weights and Measures
power of Congress to fix, 781.

Wharves
tax for use of, 580.

Wilson, James
constitutional views of, 47.

Wilson Act
construction of, 683.

Writs of Error
from federal Supreme Court to state courts, 120, 804, 978.

Woman Suffrage
not guaranteed by Fourteenth Amendment, 185.

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